

FALLING OVER BACKWARDS

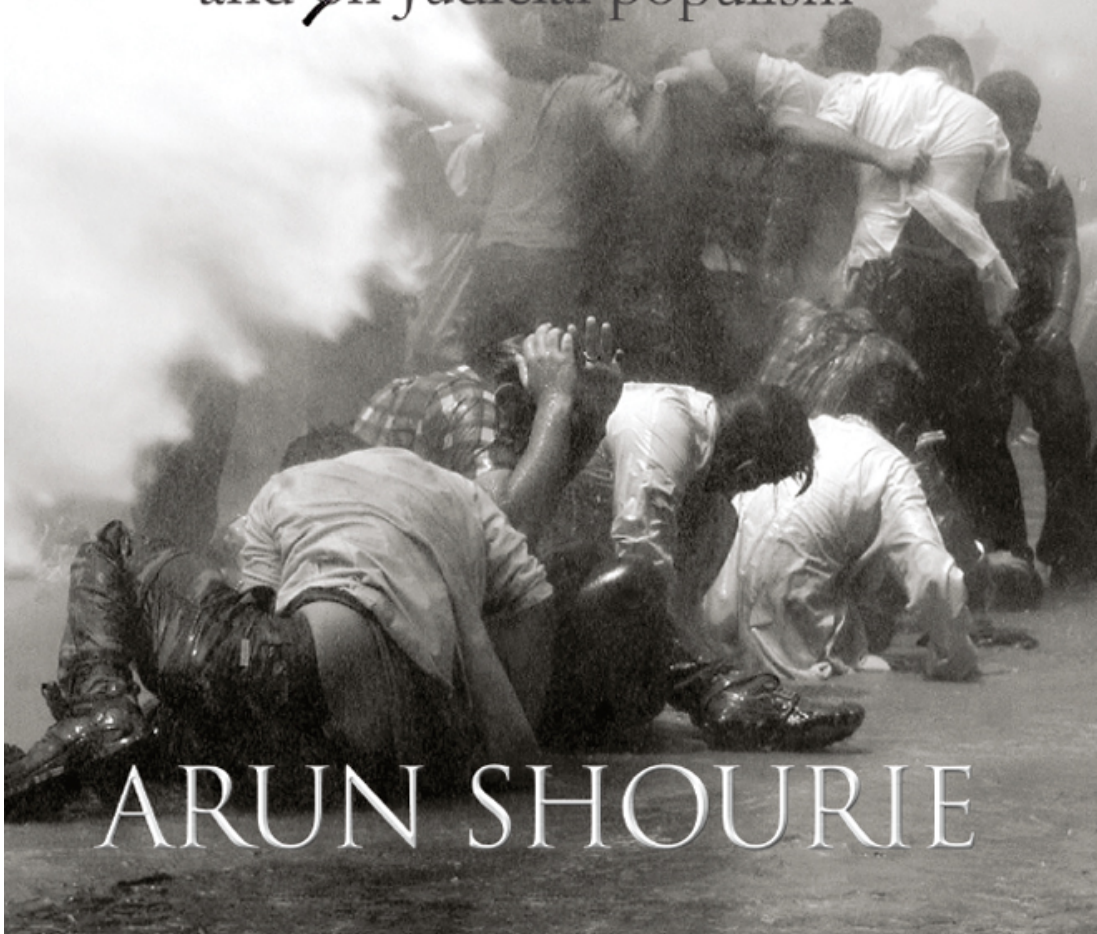
against
An essay ~~on~~ Reservations
against
and ~~on~~ Judicial populism



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Falling Over Backwards

An essay on *Reservations* and on *Judicial populism*

ARUN SHOURIE



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In memory of my mother and father

*Zindagi ke har ik mod pe nazar aayaa
Teri nigaah-e-karam kaa ghanaa ghanaa saayaa...*

—Firaq

Contents

Cover

Title Page

Dedication

Epigraph

‘This way lies not folly, but disaster’

What this essay is about

Constitutional provisions: what they were, what has been made of them

1. Blowing up every dyke

The race then, The race now

2. A fundamental lesson

3. The very thing that was shunned becomes central

4. The race then, and the one now

5. The nebulous made solid

6. And how has the court come to accept all this?

7. Two fundamental questions

The juggernaut

8. 50 per cent: origin of the figure, its fate, consequences of its fate

9. Promotion: just a facet of recruitment!

10. From equality of opportunity to that of outcomes, From absence of disabilities to presence of abilities, From providing assistance to imposing handicaps

Conspiracy! Conspiracy!

11. ‘Merit-mongers’

12. In any case, what is ‘merit’?

This, or else

13. A lecture on induction!

14. Induction in practice!

15. Timorousness compounded by principle!

On the ground

16. The situation in the field

The real way

17. The state structure and beyond

18. The other way

Epilogue or suicide by a thousand cuts

Three slaps

The politicians’ response

The judges’ response

Index of cases

Index

Acknowledgements

About the Author

By the same author

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‘This way lies not only folly, but disaster’

I have referred above to efficiency and to our getting out of our traditional ruts. This necessitates our getting out of the old habit of reservations and particular privileges being given to this caste or that group. The recent meeting we held here, at which the chief ministers were present, to consider national integration, laid down that help should be given on economic considerations and not on caste. It is true that we are tied up with certain rules and conventions about helping the scheduled castes and tribes. They deserve help but, even so I dislike any kind of reservation, more particularly in Services. I react strongly against anything which leads to inefficiency and second-rate students. I want my country to be a first-class country in everything. The moment we encourage the second-rate, we are lost.

The only real way to help a backward group is to give opportunities of good education, this includes technical education which is becoming more and more important. Everything else is provision of some kind of crutches which do not add to the strength or health of the body. We have

made recently two decisions which are very important: one is universal free elementary education, that is the base; and the second is scholarships on a very wide scale at every grade of education to the bright boys and girls, and this applies not merely to literary education, but, much more so, the technical, scientific and medical training. I lay stress on the bright and able boys and girls because it is only they who will raise our standards. I have no doubt that there is a vast reservoir of potential talent in this country if only we can give it an opportunity.

But if we go in for reservations on communal and caste basis, we swamp the bright and able people and remain second-rate or third-rate. I am grieved to learn how far this business of reservations has gone based on communal considerations. It has amazed me to learn that even promotions are based sometimes on communal or caste considerations. This way lies not only folly, but disaster. Let us help the backward group by all means, but never at the cost of efficiency. How are we going to build the public sector or indeed any sector with second-rate people?

—Jawaharlal Nehru, Letter to chief ministers, 27 June 1961

What this essay is about

‘Merit and efficiency is [sic] a pure Aryan invention, aimed at maintaining their monopoly,’ the Supreme Court judgment quotes, with manifest approbation, from the typical write-up of a propagandist. The title of the write-up is, ‘Merit, my foot. A reply to Anti-Reservation Racists.’ ‘Nowhere in the world,’ the Supreme Court says on the authority of this person, are “merit and efficiency” given so much importance as in India which is now pushed to the 120th position—virtually the last among different countries in the world.’ ‘Upper caste rulers of India,’ it continues on the same person’s authority, ‘keep the country’s vast original inhabitants—Untouchables, Tribals, Backward Castes and “religious minorities”—permanently as slaves with the help of this “merit” mantra. By “merit and efficiency” they mean the birth. Merit goes with the highborn—the blue blood. This is pure and simple racism. That birth and skin-colour have nothing to do with “merit and efficiency” (brain) is a scientifically proved fact. But the ruling class nowhere in the world is concerned with science because science stands for progress. And those interested in progress will have to be human. That is not so in India. If one has to see man’s inhumanity to man in its most naked form he must come to India, the original home of racism and inequality. So, the merit theory beautifully suits its ruling class or caste....’¹

The author of the publication² which the Supreme Court cites to buttress its judgment is a rabid propagandist. He is given to hurling the vilest abuse. For years and years he and his venomous rag of a journal have lauded the British rulers and British rule; they have hailed those who helped conquer India for the British; they have advocated violence. And here we have the Supreme Court of India relying on the rant to fortify its judgment!

But why look at what the Supreme Court *cites*? Why not look at what it says on its own? ‘Efficiency is very much on the lips of the privileged whenever reservation is mentioned,’ it declares in a judgment that we shall examine in a moment. ‘Efficiency, it seems, will be impaired if the total reservation exceeds 50%; efficiency, it seems, will suffer if the “carry forward” Rule is adopted; efficiency, it seems, will be injured if the Rule of reservation is extended to promotional posts. From the protests against reservation exceeding 50% or extending to promotional posts and against the carry forward Rule, one would think that the civil service is a Heavenly Paradise into which the archangels, the chosen of the elite, the very best may enter and may be allowed to go higher up the ladder.’ ‘But the truth is otherwise,’ it continues. ‘The truth is that the civil service is no paradise and the upper echelons belonging to the chosen classes’ are ‘not necessarily models of efficiency.’ ‘The underlying assumption,’ the court asserts, ‘that those belonging to the upper castes and classes, who are appointed to the non-reserved posts will, because of their presumed merit, “naturally” perform better than those who have been appointed to the reserved posts and that the clear stream of efficiency will be polluted by the infiltration of the latter into the sacred precincts is a vicious assumption, typical of the superior approach of the elitist classes.’ ‘And what is merit?,’ it demands. And answers: ‘There is no merit in a system which brings about such consequences...’ ‘Always one hears the word “efficiency” as if it is sacrosanct and the sanctorum has to be fiercely guarded...,’ it declares. ‘Efficiency is not a *mantra* which is whispered by the *Guru* in the *shishya*’s ear,’ it scoffs. ‘The days of Dronacharya and Ekalavya are over....,’ it warns.³

This essay is about how we have got from Panditji’s ‘This way lies not only folly, but disaster’, to pronouncements of this kind.

The basic explanation, of course, is the direction that politics has taken. As politicians and political parties have been less and less able to commend themselves on the basis of their performance, they have deployed a standard technique: look for a grievance, for some measure by which it can be shown that the target group has been left behind; when you can’t find the grievance, invent it; stoke the sense of being discriminated against; frighten the group into believing that others are out to take away even more of what

is *its* right; and present yourself as the only available saviour. Inevitably, in each succeeding round, two things have happened. On the one side, the grievances that have been stoked have been more and more far-fetched. On the other, the group at which the rhetoric has been directed has been narrower and narrower.

In the end, politicians pass laws. They appoint judges as much as vice chancellors and IGs of police. Hence, the ultimate responsibility lies with them. But they have received much help from others—the ‘progressives’ who have dominated public discourse, for instance; a handful of ‘progressive’ judges, for another. This essay is primarily about these aiders and abettors—for at least some of them, the word should really be ‘instigators’. In a word, it is about the turn that discourse has taken in the last thirty years, and the price that the country has to pay for it today.

Both the perversity and the costs could have been illustrated by the rhetoric of political leaders, the harangues of the large number who have lunged for casteist politics. But their declarations are so vapid that it is almost an insult to devote a book to them.

Both the perversity and the costs could just as easily have been illustrated by examples from the writings of many of our ‘progressive’ commentators. But there are three drawbacks to citing them. Their writings are the staple of our journals and newspapers. The book would, therefore, become ten times more voluminous. Moreover, as they have hogged public space for thirty years, the reader can himself garner the examples with ease. And then there is always the problem: we have but to cite one of them, and so many are apt to question his significance, and of his pronouncements.

I have, therefore, chosen to illustrate the descent, and to depict the consequences, with judgments of our Supreme Court.

That, of course, eliminates one problem: no one can turn back and say of the judges, ‘But who are they?’ But it leaves another. The judgments are prolix and repetitive in the extreme. The ‘progressive’ judges, no less than their counterparts in the popular media, just keep repeating a standard set of assertions. They just keep invoking each other. Hence, on occasion, as the reader comes to a passage, he might feel, ‘Hasn’t that been set out in the book already?’

But for at least four reasons I would hope that he will still wade through each successive passage. One, given what the judges do, that sort of

repetition—they would use the word ‘reiteration’—is inevitable. Two, in fact the succeeding judges do not just reproduce what the earlier ‘progressives’ have said. They build on it. In a sense, each feels *compelled* to build on the radical magniloquence of the one he is invoking. He feels *compelled* to invent yet another ‘reason’, to paste an even viler motive.... He adds a phrase, he loosens a condition, sometimes he adds just one word—most often we would not even notice the addition, yet each addition lowers standards another notch. Three, on occasion the passage illustrates different facets of the ‘reasoning’ on which the progressives build their assertions: to see its full import, we must reflect on the passage in different contexts. Most important, we must know those whom we must obey: as judges are among them, we must read what they have to say—as much as possible in their own words.

I would hope, therefore, that the reader will persevere and examine successive passages. Nor is it just that each successive passage marks yet another stage in the descent. It has an operational consequence: it propels the country even faster from the folly that Panditji asked us to heed to the disaster that he asked us to beware.⁴

Constitutional provisions:
what they were,
what has been made of them

Blowing up every dyke

How far we have descended! Today progressives dress up their casteism as secularism! The benefits of reservation shall be extended to Muslims and Christians also, they proudly announce. In Andhra the decision of the government has had to be twice struck down by the courts – the government had decreed reservations for Muslims qua Muslims. Even as moves are afoot to get that judgment reversed, the Central government directed the armed forces to count soldiers and officers by their religion. Nor was the move an inadvertence. It arose as a result of a committee that the government had appointed under a former chief justice of the Delhi High Court. Each member of the committee has been carefully selected for his ‘secular’ and ‘progressive’ beliefs. Each term of reference on which the committee has been asked to supply information and make recommendations has been just as carefully selected to justify reservations and other concessions to Muslims as a religious group:

- ‘What is their relative share in public and private sector employment?... Is their share in employment in proportion to their population in various states?...
- ‘What is the proportion of Other Backward Classes (OBCs) from the Muslim community in the total OBCs population in various states? Are the Muslim OBCs listed in the comprehensive list of OBCs prepared by the National and State Backward Classes Commissions and adopted by the Central and state Governments for reservations for various purposes? What is the share of Muslim OBCs in the total public sector employment for OBCs in the Centre and in various states in various years?...

Every single item betrays the singular purpose of the whole exercise—to provide the rationale for extending reservations to Muslims. Nor is that opportunism confined to the present ruling coalition. In the run-up to the 2005 elections in Bihar, rival groups were vying with each other promising reservations for Muslims qua Muslims.

The object of the framers of the Constitution was, as ours must be, quite the opposite. It was to wipe out the cancer of caste even from Hindu society. Only with the greatest reluctance did they agree to allow reservations for the Scheduled Castes and Tribe – for they felt that doing even this much would perpetuate caste distinctions.

The reservations were, therefore, to be exceptions to the general rule.

Moreover, the provisions by which these were allowed were crafted carefully to be just *enabling* provisions. They were worded to confer no more than a discretionary power on the state. They did not cast a duty on the state to the effect that it must set apart such-and-such proportion of seats in educational institutions or of posts in government services on the basis of birth. The provisions were written so as to obviate a challenge to the steps that the state may take to raise the downtrodden. They were not to confer a right on anyone.

And the whole scheme was to be a temporary affair, a scheme made necessary by the circumstances of the moment.

Proposals were advanced during the deliberations of the Constituent Assembly that there be reservations for Muslims, etc. also. After reflection, the representatives of these communities themselves decided that such reservations on communal lines would be harmful to the country, and to the communities themselves.

Accordingly, when reservations in government jobs for Scheduled Castes were discussed, no one demanded that these be extended to non-Hindus in general. Two Sikh members, however, said that these should be applicable to the Sikhs also. ‘And so when these proposals were brought to us,’ Sardar Patel informed the Constituent Assembly, ‘I urged upon them (the Sikh members) strongly not to lower their religion to such a pitch as to really fall to such a level where for a mess of pottage you really give up the substance of religion.’

‘But they did not agree,’ he lamented. ‘These people have now agreed to be lumped into the Scheduled Castes; not a very good thing for the Sikh

community, but yet they want it.'

The Scheduled Caste representatives protested vehemently against this inclusion.

The Sardar, therefore, sought to justify the expedient—the traumatic hardships the Sikhs have suffered because of the Partition, the fact that on the testimony of these leaders of the community, in spite of the fundamental tenets of their religion, castes still abound among them... As a special case, therefore, allow this singular exception....

So extreme was the reluctance. And it was all to be temporary: 'Now our object is, or the object of this House should be,' the Sardar declared, 'as soon as possible and as rapidly as possible to drop these classifications and differences and bring all to a level of equality.' And so he appealed to all section – majority and minority, high caste and low caste—to work for their obliteration.

And that approach remained the beacon.

'It is a motion which means not only discarding something that was evil,' Panditji said, 'but turning back upon it and determining with all our strength that we shall pursue a path which we consider fundamentally good for every part of the nation.' He had risen in the Constituent Assembly to second a motion that Sardar Patel had moved to abolish separate electorates. 'Reluctantly we agreed to carry on with some measure of reservation,' he said – in part to leave their abolition to the minorities, and in part to make sure that everyone would respect the rights of those affected. 'We agreed to that reservation,' he said, 'but always there was this doubt within our minds, namely, whether we had not shown weakness in dealing with a thing that was wrong. So, when this matter came up in another context, and it was proposed that we do away with all reservations except in the case of the Scheduled Castes, for my part I accepted that with alacrity and with a feeling of great relief, because I had been fighting in my own mind and heart against this business of keeping up some measure of separatism in our political domain; and the more I thought of it the more I felt that it was the right thing to do not only from the point of view of pure nationalism, which it is, but also from the separate and individual viewpoint of each group, if you like, majority or minority.' There is some point in having a safeguard of this kind where there is autocratic rule or foreign rule, he explained. But in a full-blooded democracy, such devices in fact end up

harming the section they are intended to benefit – the section gets isolated from the general populace; the natural empathy that the society as a whole should have for that section gets eroded.

‘Frankly,’ he told the Assembly, ‘I would like this proposal to go further and put an end to such reservations as there still remain. But again, speaking frankly, I realize that in the present state of affairs in India that would not be a desirable thing to do, that is to say, in regard to the Scheduled Castes.’ He consoled himself and the Assembly by drawing attention to two attenuating circumstances. He told the delegates, ‘I try to look upon the problem not in the sense of a religious minority, but rather in the sense of helping backward groups in the country. I do not look at it from the religious point of view or from the caste point of view, but from the point of view that a backward group ought to be helped, and I am glad that this reservation will be limited to ten years....’¹

In the letter he wrote to the chief ministers a few days later, he reverted to this matter, one, as he wrote, ‘having a certain historic significance’. ‘I am happy that this decision was made and that we had the courage to make it and thus get out of the vicious circle in which we have been for the last several decades....’²

All reservations except those for Scheduled Castes were being abolished. Even these were being retained ‘reluctantly’. He would have wanted even these to go. In any case, they were being retained only for ten years....

The focus in that discussion and in that letter was on reservations in legislatures. Panditji’s aversion to reservations in services was much stronger. He was strenuously opposed to them. He was certain they would foment second-rate and third-rate standards, that they would consign the country to mediocrity and worse.

Even as the government set up the Backward Classes Commission under the chairmanship of Kakasaheb Kalelkar, and even in the letter he sent to the chief ministers about the setting up of the Commission, and in which he told them that its work would touch the lives of over fourteen crore people, Panditji wrote, ‘This minute division of our people in castes and groups is a terrifying factor. Until we break down these barriers and, in effect, break down the caste system, we shall never wholly get over the difficulties which

have faced us....’³ A while later, inaugurating a conference on tribal affairs, he declared that the government aims ‘ultimately at removal of all these appellations, descriptions and names which ideologically and physically separate the people as the Depressed Classes, the Harijans, the Scheduled Castes, the Scheduled Tribes, and so on....’⁴

‘It cannot be denied,’ Pandit Nehru’s government informed Parliament in its Memorandum on Action Taken on the Report of the Backward Classes Commission that ‘the caste system is the greatest hindrance in the way of our progress towards an egalitarian society, and the recognition of specified castes as backward may serve to maintain and even perpetuate the existing distinctions on the basis of caste.’ In 1961, the home ministry issued a circular to state governments on the matter: ‘While the state governments have the discretion to choose their own criteria for defining backwardness, in view of the government of India it would be better to apply the economic tests than to go by caste.’

That was the perspective at the time the Constitution was framed. That was the perspective during Panditji’s time as he turned India towards the future. With that perspective, provisions of the Constitution were very carefully worded.

What the framers provided

The basic approach was specified in Articles 14, 15(1), 16(1) and 16(2).

Article 14 guaranteed equality to all: ‘The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.’ That was the fundamental guarantee.

Article 15(1) made that guarantee specific in one particular: ‘The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them,’ it prescribed.

Article 15(2) guaranteed equal access for everyone to public facilities like wells, restaurants, etc.

Article 15(3) contained a proviso: it is important as it recalls the only categories for which the framers were prepared to countenance curtailment of equal provisions. *Article 15(3)* provided: ‘Nothing in this article shall prevent the State from making any special provision for women and children.’ Notice again: the only categories for which special provisions

were envisaged were women and children. In particular, notice that no exceptions were envisaged on the basis of caste.

Article 16(1) made the fundamental guarantee of equality contained in Article 14 specific in another particular, one that was particularly important in those days when job opportunities were much more restricted than they are today, and governmental jobs were looked up to much more than is the case now: ‘There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State,’ Article 16(1) prescribed.

Article 16(2) did for governmental employment what Article 15(1) did for a citizen’s living in general: ‘No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State,’ it prescribed.

Article 16(4) contained a proviso, and again it is important as a reminder of what the framers of the Constitution envisaged. This clause provided: ‘Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.’

Even at this preliminary stage we should note four points of significance as they bear on everything that we shall encounter from now on:

- The fundamental guarantee in every provision was of equality, of non-discrimination.
- Caste was most consciously eschewed: the proviso to Article 15(1) spoke only of *women and children*; Article 16(4) spoke only of ‘any backward *class* of citizens’.
- Where caste was mentioned, it was only to prohibit discrimination on grounds of caste.
- Where ‘equality’ was made specific – in Article 16(1) in regard to employment under the state, for instance – the expression that was used was ‘equality *of opportunity*’, an expression that, we shall soon see, has been buried deep under the rhetorical flourishes of progressives.

Three other provisions had a bearing on the questions that we shall consider, and they were to come into play almost as soon as the Constitution was adopted.

The first of these was *Article 29*. It had two clauses. The first provided, ‘Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.’ Again, notice that the word ‘religion’ was *not* mentioned: contrast that with the way this provision – and the succeeding Article 30 – are invoked these days to assert, for instance, ‘rights’ of Muslims qua Muslims. For our present discussion, however, the second clause of Article 29 is what is important: it was to have an immediate consequence. This clause provided: ‘No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.’

The next article that was to be invoked in a manner that led to changes that we shall encounter in a moment was *Article 46*. It was a provision in the – non-enforceable – Directive Principles part of the Constitution. The article provided, ‘The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.’ Again, notice that the article talked of ‘weaker sections of the people’. The only castes that were mentioned were ‘Scheduled Castes’.

Finally, the framers incorporated a vital caveat to special measures that might be instituted to induct members of Scheduled Castes and Scheduled Tribes into governmental services. *Article 335* provided, ‘The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.’

Alterations and additions

It so happened that in Madras, a student who had done manifestly well in the examinations but who happened to have been born to parents who were

not from among the Scheduled Castes was denied admission, and those who had fared much worse than him, but who happened to have been born to Scheduled Caste parents, were granted admission. The decision was challenged. The Madras Government argued that Article 46—a Directive Principle—overrode Article 29(2); that, as one of the special measures that the state was to take for the advancement of Scheduled Castes, it was entitled to grant admission to the students who had done poorly in the examinations and deny it to the non-Scheduled Caste student who had done well.

The Supreme Court rejected the argument decisively. Directive Principles cannot override Fundamental Rights, it held. In particular, in view of the prohibition contained in Article 29(2), the meritorious student cannot be denied admission on grounds of his caste, and this is what has manifestly been done, it held.⁵

This ruling led to a provision being incorporated in the first amendment to the Constitution. A new clause was added to Article 15, clause (4). It provided: ‘Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.’

A pattern forms

This pattern was to be repeated again and again: the courts would try to stem the tide with some dyke; politicians would blow it up. And as political parties came to depend more and more on sectional appeals, in particular on stoking castes, the alterations and additions became more frequent, and of ever-increasing consequence.

From *M.R. Balaji* to *Indra Sawhney*, cases we shall have occasion to study in some detail, the Supreme Court held that Article 16(4) was an exception to the fundamental guarantee provided to all citizens that they shall have equality of opportunity in competing for governmental employment. The court held, as Dr Ambedkar had stated in this very context during debates of the Constituent Assembly that an exception cannot be allowed to swallow the rule. Hence, the court held, speaking

generally, reservations should not exceed 50 per cent of the jobs being filled.

A state like Tamil Nadu had already crossed the limit: in it 69 per cent of the jobs had come to be reserved on the basis of birth. A typical sequence was enacted in the wake of the Supreme Court's decision in *Indra Sawhney*.

In 1993/94, as a consequence of the Supreme Court's judgment in *Indra Sawhney*, the Madras High Court held that, while reservations in admissions to educational institutions may continue at their existing levels for 1993/94, they must be brought down to 50 per cent from 1994/95.

The Government of Tamil Nadu filed an appeal against this order in the Supreme Court. The court reiterated that reservations should not exceed 50 per cent.

On 9 November 1993, the Tamil Nadu Assembly unanimously passed a resolution requesting the Central government to take steps to amend the Constitution so as to enable Tamil Nadu to continue its 69 per cent reservations. On 26 November, an all-party meeting emphasized that there should not be any doubt or delay in enabling Tamil Nadu to continue with its 69 per cent reservations.

The meeting over, the Tamil Nadu Assembly enacted a bill – the Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of appointments or posts in the Services under the State) bill, 1993 – to continue the reservations, and sent it to the Centre under Article 31-C.

The Union home minister held another all-party meeting in Delhi on 13 July 1994. The consensus was that the president should give his assent to the bill. Hence, the assent was given on 16 July 1994. Accordingly, the bill was notified by the Tamil Nadu government.

The state government next requested the Centre to take steps to place the Act in the Ninth Schedule so that it could not be challenged in courts. The Constitution was, accordingly, and to much applause, amended for the seventy-sixth time in 1994, and the Tamil Nadu legislation was put beyond the reach of courts.

In a series of cases, culminating in *Indra Sawhney*, the Supreme Court had held that reservations could be provided only at the time of entry to a service. It had given several reasons on account of which to set apart even promotions for some persons because of their birth was both unwise and

unconstitutional. In particular, the court had said that doing so would impair the efficiency of administration and would, therefore, fall foul of Article 335.

In May 1995, again to much applause, and in response to yet another all-party consensus, the Constitution was amended for the seventy-seventh time. A new clause (4A) was added to Article 16. This new clause provided: ‘Nothing in this article shall prevent the State from making any provision for *reservation in matters of promotion* to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.’

As we shall see, it became standard practice for governments to go on relaxing – to the point of setting aside completely – standards for inducting certain sections into governmental jobs as well as into educational institutions solely because of their birth. It turned out that, even after the standards had been lowered in this way, on occasion it was not possible to find enough candidates to fill the vacancies. Governments then provided that, when vacancies could not be filled in one year, they should be carried over to subsequent years. Now, it was evident that this way in a subsequent year, the general candidates seeking to get in on the basis of merit would get excluded from a majority of the seat – that well above 50 per cent of the seats would get reserved to be apportioned on the basis of birth. The matter came up before the Supreme Court several times. In *Indra Sawhney*, the court reaffirmed that the total quantum of reservations—including the ones carried forward from preceding year – should not exceed 50 per cent.

The response of the political class was true to form: the Constitution was amended for the eighty-first time. The new amendment specified that any provision for reservation made under clause (4) or clause (4A) of Article 16 shall be considered as a separate class of vacancies to be filled up in any succeeding year or years and this class of vacancies shall not be considered together with the vacancies of the year in which they were being filled up for the purpose of determining the ceiling of 50 per cent. A new clause (4B) was added to Article 16. This new clause provided: ‘Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a

separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.'

Standards for some categories of candidates kept getting more and more relaxed! The new, relaxed 'standards' were challenged repeatedly in courts. The course they took through the court – the way some progressive judges justified the relaxations, the way others shut their eyes to what was staring them in the face – is depressing in the extreme. We shall catch glimpses of the sequence, and the rationalizations as we proceed. For the moment, our concern is only with what the political parties did. In *S. Vinod Kumar v. Union of India*,⁶ the Supreme Court held that, in view of the effect loosening standards would have on efficiency of administration, and in view, therefore, of how they would violate the command of Article 335, standards could not be relaxed or waived when it came to promotions in government services. The Supreme Court in this case reaffirmed what it had held in this regard in *Indra Sawhney*.

The Constitution was, therefore, amended for the eighty-second time in 2000. Article 335 was henceforth to have a proviso which was to read as follows:

Provided that nothing in this article shall prevent in making of any provision in favour of the members of the Scheduled Castes and Scheduled Tribes *for relaxation in qualifying marks in any examination or lowering the standards of evaluation*, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.

Even that has been far from the end. Promotions in government departments came to be determined by an innovation – the 'Roster System'. By this system, specified vacancies at each level came to be set apart for persons who belonged to such-and-such caste: vacancies numbers 23, 37, 51... shall be set apart for candidates from caste 'X'... This system came to play havoc, and resulted in numerous 'anomalies' and injustices that we shall encounter. Juniors got 'accelerated promotion', and came to leap over their senior – not because they had any extra merit but because of their birth. It resulted in much heartburn and demoralization.

There was one caveat to the system. Assume A', a reservationist, got into service three years after 'B'. A' leapt over 'B' because a vacancy arose that was reserved for his sub-sub-caste. But eventually, when 'B' got his promotion to the higher grade in the normal course, he would resume his seniority over A'. That was the rule – 'accelerated promotions' but not seniority.

In fact, as the years passed, the reservationists began to get not just accelerated promotion but also 'consequential seniority'. That is, 'A' now came to have a prior claim to get to the still higher level over 'B' because, by virtue of the post having been reserved for his sub-sub-caste, he had been promoted to a particular level earlier than 'B'. In a series of judgments, as we shall see in greater detail later, such as *Union of India v. Virpal Singh Chauhan*⁷ as well as *Ajit Singh Januja v. State of Punjab*,⁸ the Supreme Court struck this practice down.

The consequence?

The Constitution was amended for the eighty-fifth time. The new clause which had been introduced in Article 16 – clause (4A)—by the seventy-seventh amendment was further amended, and the words 'in matters of promotion, with consequential seniority, to any class' were introduced. Henceforth the clause was to read:

Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, *with consequential seniority*, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

Even that has not been the end. Not by a long shot. A long-running strand of litigation – relating to the right of 'minority institutions' to run their affairs without interference from the state has brought down an unexpected meteor on the matter we are considering – that of reservations per se.

The latest distortion

The course this litigation, the decisions, and the actions legislatures have subsequently taken, show two separate sorts of distortions – each as ruinous as the other.

The framers of the Constitution had gone out of their way to reassure minorities. The two articles that have a bearing on what we are at present concerned with are Articles 29 and 30.

We have already encountered clause 2 of Article 29 which provides that ‘(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.’

Clause 1 of the article provides, ‘Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.’

The clauses of Article 30 that are relevant to the questions we are considering provide:

- (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.
- (2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

The scheme of these two articles is clear as can be. It is twofold:

- Minorities have the right to conserve their language, script and culture.
- They have the right to establish and administer educational institutions of their choice.

Clearly, the two articles bear on each other. They address a common objective – to help minorities maintain their language, script and culture. The educational institutions that the framers had in mind and which they assured the minorities they could set up and administer are the ones that have been set up to conserve their language, script and culture. The sort of institution that is contemplated is evident from the very words and context of the two articles: an institution set up by members of a minority for preserving the language, script and culture of that minority. Say, some Muslims apprehend that Urdu is dying out; they set up an academy to conserve and teach that language – the articles guarantee them the right to set up and administer that institution. The second clause of Article 30

makes the right more specific – it guarantees that the persons concerned can set up an institution of their choice: that they shall have the right to determine what kind of an institution will best help conserve Urdu – neither the state nor others will have the authority to tell them what kind of an institution will best sustain Urdu.

The first derailment was caused by plucking the words ‘of their choice’ out of context, by tearing them away from the object for which Articles 29 and 30 gave minorities the right to set up and administer institutions. A normal engineering college or a college of dentistry can by no stretch be taken to be an institution that has been set up to help conserve the language, script or culture of the minority. Yet, provided the engineering or dentistry college has been set up by members of a minority, it was presumed to enjoy the protection of Articles 29 and 30, and thereby be beyond the reach of the state.

The result has been as predictable as it is iniquitous and absurd: if Ram Sharan sets up an engineering college, the state as well as the university concerned can prescribe all sorts of things it must do; if Mohammed Aslam sets up an exact clone of that engineering college across the road, teaching exactly the same subjects, using exactly the same textbooks, neither the state nor the university can regulate its functioning! Indeed, for decades, courts maintained that the state could not prescribe that ‘X’ or ‘Y’ be done by the institution *even if it was certain that these steps were imperative in the national interest*. But that is a stream different from our present concern – reservations.

Three cases lead us to the latest amendment of the Constitution – one that has compounded the inequity and absurdity which the earlier falsification had embedded into the construction that came to be put on these articles. *T.M.A. Pai Foundation v. State of Karnataka* was decided by eleven judges.⁹ This was followed by *Islamic Academy of Education v. State of Karnataka*¹⁰ – a case that was decided by five judges. And that has been followed by *P.A. Inamdar v. State of Maharashtra*¹¹ – another case that has been hotly contested and eventually decided by a bench of seven judges.

In *T.M.A. Pai*, the Supreme Court reaffirmed that, by virtue of Article 30(1), minorities, of course, have a right to set up educational institutions

‘of their choice’. Hence, these can be for imparting cultural, linguistic, religious, or, indeed, technical education. If a minority institution is not receiving aid from the state, the latter shall not regulate admission – except that, in the interest of maintaining educational standards, the state may specify qualifications and minimum conditions for eligibility. The right to admit students is an integral part of administering an educational institution, hence the minority institution can determine its own admissions policy and procedure – so long as admissions are on a transparent basis and merit is adequately taken care of. The right to administer such institutions is not absolute – the state can intervene to ensure that educational standards and excellence are maintained – all the more so in regard to admissions to professional institutions.

Second, the Court ruled, the minority institution shall admit ‘a reasonable extent of non-minority students’ – but how much shall be ‘a reasonable extent’ would vary according to the type of institution, the courses that are being taught, the educational needs of the minority in that state, etc. The state government shall notify the percentage keeping these varied considerations in mind.

Third, it held, even minority institutions must ensure that their admissions procedures are fair and transparent, and that selection of students in professional and higher education colleges is on the basis of merit. ‘Even an unaided minority institution ought not to ignore the merit of the students for admission, while exercising its right to admit students to the college,’ the Supreme Court emphasized, ‘as in that event, the institution will fail to achieve excellence.’

Fourth, the court laid down that – and this is to be especially so in regard to professional colleges admissions should be on the basis of common entrance tests.

Notice that throughout the ruling the Supreme court is guided by a deep concern for merit and excellence, especially so in regard to subjects taught in ‘professional colleges’ – engineering, medicine, and the like. Just because the institution is in some sense a ‘minority institution’, the merit of students should not get ignored while selecting some for admission; second, just because an institution is able to claim a minority status, it should not escape its duty to ensure excellence. This, the court noted, is imperative as the interests of the country as a whole require that excellence be maintained

– a truth that has been repeated often and which we will have occasion to recall in the context of other judgments of the same court.

In *Islamic Academy of Education*, the Supreme Court held that, while minority institutions have autonomy in administration, the principle of merit cannot be sacrificed, as the national interest requires that there be excellence in professions. Doctors coming out of medical colleges set up and administered by minorities shall be treating citizens of all classes and religions, and not just members of the community someone from which has set up that college. Accordingly, said the court, the State can insist on merit-based admission as a condition of extending recognition to that institution. And it prescribed that a committee – headed by a retired judge of the high court – be set up to oversee the examination for admissions.

In *P.A. Inamdar*, the Supreme Court has again emphasized that, whether the institution is a minority or non-minority one, the interest of the country requires that it maintain excellence, all the more so in higher classes and in technical courses. ‘Excellence in education and maintenance of high standards at this level [graduate and postgraduate studies, as also technical courses] are a must,’ the Supreme Court declares. ‘To fulfill these objectives, the State can and rather must, in national interest step in. The education, knowledge and learning at this level possessed by individuals collectively constitutes national wealth’ – words we should bear in mind as we come to pronouncements of the same Supreme Court in other cases. All this – the need to maintain excellence and the right and duty of the state to ensure that the requisite standards are maintained – holds whether the institution is a minority one or non-minority one.¹²

Furthermore, the court has held, the state can prescribe that the institution set apart a certain proportion of seats for financially or socially backward sections of society. What this proportion should be, the court has left to the state in which the institution is located to determine.

Notice that in each of these cases, both minority and non-minority colleges were involved, as well as colleges which were not availing of any aid from government. We will see the importance of this in a moment.

The court has used three variables to classify the institutions, and thereby delineate the kind of authority that the state has in regard to each category of educational institution. The variables are: Is the institution a

‘minority’ or ‘non-minority’ institution? Is it receiving governmental aid? Is it seeking or has it received recognition from the state?

The court has held that

- In regard to minority, unaided, unrecognized institutions, the state is not to mandate any quotas;
- In regard to minority, unaided colleges to which recognition has been accorded, the state can specify standards that entrants must pass but that it is not to regulate admissions or fees;
- In regard to minority, aided, recognized institutions, the state can regulate various aspects of the functioning of the institution without diluting the minority status of the institution.

As regards prescribing quotas, the court has held that there is not much difference between unaided minority and unaided non-minority institutions: in either case, the state is *not* to prescribe quotas. It will pay us to spare a moment and glance at what the Supreme Court says in *P.A. Inamdar* while reaffirming this point:

So far as appropriation of quota by the State and enforcement of its reservation policy is concerned, we do not see much of difference between non-minority and minority unaided educational institutions. We find great force in the submission made on behalf of the petitioners that the States have no power to insist on seat sharing in the unaided private professional educational institutions by fixing a quota of seats between the management and the State. The State cannot insist on private educational institutions which receive no aid from the State to implement State’s policy on reservation for granting admission on lesser percentage of marks, i.e. on any criterion except merit.

As per our understanding, neither in the judgment of *Pai Foundation* nor in the Constitution Bench decision in *Kerala Education Bill*, which was approved by *Pai Foundation*, there is anything which would allow the State to regulate or control admissions in the unaided professional educational institutions so as to compel them to give up a share of the available seats to the candidates chosen by the State, as if it was filling the seats available to be filled up at its discretion in such private institutions. This would amount to nationalization of seats which has been specifically disapproved in *Pai Foundation*. Such imposition of quota of State seats or enforcing reservation policy of the State on available seats in unaided professional institutions are acts constituting serious encroachment on the right and autonomy of private professional educational institutions. Such appropriation of seats can also not be held to be a regulatory measure in the interest of minority within the meaning of Article 30(1) or a reasonable restriction within the meaning of Article 19(6) of the Constitution. Merely because the resources of the State

in providing professional education are limited, private educational institutions, which intend to provide better professional education, cannot be forced by the State to make admissions available on the basis of reservation policy to less meritorious candidates. Unaided institutions, as they are not deriving any aid from State funds, can have their own admissions [procedures] if fair, transparent, non-exploitative and based on merit.¹³

In a word,

- No reservations in educational institutions that are neither receiving any governmental aid nor are seeking recognition;
- And in this regard, minority and non-minority institutions are to be at par.

The judgment had but to be delivered, and a howl went up. And within days, the Constitution was amended for the ninety-third time – to acclaim that has become customary for such amendments. Henceforth, Article 15 shall have a new clause (5) to the following effect:

(5) Nothing in this Article or in sub-clause (g) of clause (1) of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially or educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30.

In a word, the amendment threw overboard the judgment of the Supreme Court on both counts:

- Whereas the Supreme Court had said that there shall be no reservations in private, unaided colleges, the amendment decreed that there *shall be* reservations;
- Whereas the Supreme Court had said that in this regard there shall be no difference between minority and non-minority institutions, the amendment decreed that there *shall be* a difference.

The Supreme Court had catered to law, to justice, to excellence. The political class catered to vote bank – the SC/ST/OBC bank, and the minorities bank.

Even as the bill to overturn the Supreme Court judgment was being debated, the shout went up, ‘Through this Bill, you are authorizing state governments to prescribe reservations in private colleges in their jurisdiction. That is just passing the buck. What about the educational institutions that are in *your* control – the Central government institutions like the IITs and IIMs? What are you waiting for in regard to them?’ And so, the session of Parliament was but to be over and the government announced that the Mandal formula will apply to them also – in addition to the 22.5 per cent seats they were reserving for the Scheduled Castes and Tribes, they would henceforth reserve 27.5 per cent seats for the backward castes.

And in the Himachal Pradesh High Court, the strength of judges has fallen from nine to three even as pending cases have shot up. The reason? The state government has refused to proceed with the appointment of new judges saying that the caste composition of the names that have been recommended by the high court is not what it should be. When contacted for his comments, the chief justice expressed helplessness, telling the paper, ‘I have done my job, the rest I shrug off my shoulders.’¹⁴

And within days, the minister for the new Ministry for Minority Affairs announces that he shall notify Hindus as a ‘minority’ in Punjab, Jammu and Kashmir, and in the Northeast. “This idea has been given to me by God,” he declares.¹⁵ The implication is as clear as it will be unstoppable: the moment Hindus are given reservations in these regions, they would be getting reservations as *a religious group*. That will open the doors for Muslims being given reservations *as a religious group* all over the country – including the Northeast and Punjab, and at least two parts of J&K: Jammu and Ladakh, in each of which they are a ‘minority’!

A fundamental issue

Quite apart from the other issues it raises, issues which we shall take up in turn, the sequence draws attention to a fundamental point in our constitutional jurisprudence. Time and again, the Supreme Court held that it was striking down a practice as the practice – reservations in excess of 50 per cent, reservations in promotions, etc. – violated a basic feature of the Constitution. Parliament overturned the judgment by altering the

Constitution. Does such amendment erase the fact that the practice in question violates the basic structure of the Constitution? Is the Supreme Court to decide what constitutes the basic structure of the Constitution or the current majority in Parliament?

The questions

By what arguments has this descent, this vast departure from what the Constitution makers had prescribed been justified? Not just by the political class, but by the 'progressive' judges...

Where has this descent brought us?

Where will it take us?

Once politics set off in such directions, why does it become less and less possible to arrest the next lunge?

The race then, The race now

A fundamental lesson

“The introduction of this principle is shrouded in mystery. It is a mystery as to why it was introduced so silently and stealthily. The principle of separate representation does not find a place in the Act. The Act says nothing about it. It was in the direction – but not in the Act – issued to those charged with the duty of framing Regulations as to the classes and interests to whom representation was to be given that the Muslims were named as a class to be provided for... It is a mystery as to who was responsible for its introduction...’

That is B.R. Ambedkar writing about the Indian Councils Act of 1892 in his book, *Thoughts on Pakistan*.¹

There was no mystery, of course, as to the calculation which had led to separate electorates for Muslims. The story has been recounted often.²

The 1857 uprising had unnerved the British. But only for a while. Within two to three years of quelling it – that with great ferocity – they set to work putting together a version of it that would suit their ends: the uprising was confined to just a few pockets; it erupted as a result of local misunderstandings; there was no national sentiment behind it; the leaders themselves fought only for their feudal privilege – one local ruler because her son was not being recognized, another because his pension was being stopped, etc. That version became the only version – you will find it underlying even Panditji’s *Discovery of India*.

Of course, the British did not stop at writing history books. They commenced a series of *realpolitik* measures. The Bengal army had shown alarming solidarity. It was disbanded. Henceforth, exceptions like the Sikhs apart, people of different sorts were to be mixed in each component unit. As

Brahmins seemed to have provided the ideological leaven for the uprising, and to have constituted an all-India network, the campaign of calumny against them was redoubled.

But the main opportunity was seen elsewhere. Hindus and Muslims had fought together this time round. But there were cleavages between them. Officer after officer wrote that this division was what British policy ought to exacerbate, for in its sharpening lay the key to perpetuating the Empire: the Bharatiya Vidya Bhavan study cites several representative officials and policymakers to this effect. '*Divide et Impera* was the old Roman motto,' wrote Lord Elphinstone, governor of Bombay, whose name we still honour in the College, 'and it should be ours.' 'The existence, side by side, of hostile creeds among the Indian people,' wrote Sir John Strachey, 'is one of the strong points in our political position in India.'

What Ambedkar was to call the silent and stealthy introduction of separate electorates for Muslims via the backdoor – via the rules and directions framed under an act which itself did not mention the matter – was a major instrument of this policy. Curzon partitioned Bengal along Hindu and Muslim lines for the same reason. 'Even after this,' S. Abid Hussain wrote in his notable book, *The Destiny of Indian Muslims*,³ 'sensible Hindu and Muslim leaders in East Bengal continued to oppose the partition. The fanatic *mullahs*, however, persuaded the Muslim masses that the government of the province had now passed into their hands and aroused in them a blind fury, which naturally took the form of a revolt against the landlords and traders who were predominantly Hindu, and communal riots raged throughout the new province.' 'The partition of Bengal had to be revoked after a few years on account of the countrywide agitation against it,' Abid Hussain continued. 'Yet, it sowed the seed of division in the hearts of the people that was one day to divide the whole country...'

Curzon had to resign and leave. Minto succeeded him as viceroy. To him and his colleagues, the surcharged communal atmosphere which the Bengal partition had generated was an opportunity – an ideal opportunity to wean Muslims away from the Congress by pressing further what Abid Hussain correctly calls 'the most potent recipe... for promoting a separatist movement among the Muslims,' namely communal representation.

Minto went about it in the predictable manner. 'He (Minto) took elaborate steps to make it appear that communal representation was being introduced to meet the demand of the Muslims,' wrote Abid Hussain. 'A secret message to Nawab Muhsin-ul-Mulk, who had succeeded Sir Syed (Ahmed) as Secretary of the Board of Trustees of the Aligarh College (the predecessor of what we know as the Aligarh Muslim University), was sent through its Principal, Mr. Archbold, that he should take a delegation of prominent Muslims to the Viceroy and ask for special concessions to the community....'

A delegation of Muslim leaders accordingly waited upon the viceroy at Simla on 1 October 1906. It was led by the Aga Khan.

In its memorandum – which was actually the memorandum that had been settled by the Britishers themselves – the delegation requested that "The position accorded to the Mohammedan community in any kind of representation, direct or indirect, and in all other ways affecting their status and influence, should be commensurate not merely with their numerical strength but also with their political importance and the value of the contribution which they make to the defence of the Empire,' and with due regard to 'the position they occupied in India a little more than a hundred years ago.' To ensure this, they said, Muslims should be given the right to select their representatives through separate communal electorates.

The viceroy was graciousness itself. He told the deputation that 'In any system of representation, whether it affects a Municipality, a District Board or a Legislative Council, in which it is proposed to introduce or increase the electoral organization, the Mohammedan community should be represented as a community, (and its) position should be estimated not merely on numerical strength but in respect to its political importance and the service it has rendered to the Empire. I am entirely in accord with you... I am as firmly convinced as I believe you to be, that any electoral representation in India would be doomed to mischievous failure which aimed at granting a personal enfranchisement, regardless of the beliefs and traditions of the communities composing the population of this continent.'

Lady Minto who, as she wrote in her journal that evening, had gone in by a side door with the girls to watch the proceedings, was exultant: 'This has been a very eventful day – an epoch in Indian history,' she wrote, and quoted a letter an official had sent within hours of the deputation's visit: 'I

must send Your Excellency a line to say that a very, very big thing has happened today, a work of statesmanship that will affect India and Indian history for many a long year. It is nothing less than the pulling back of sixty-two millions of people from joining the ranks of the seditious opposition.'

In his address as president of the Congress, Mohammed Ali, who was to shoot into such prominence in the Khilafat movement, said that the deputation was 'a command performance'. Lady Minto herself referred to it as the 'engineered' deputation. Maulvi Sayyid Tufail Ahmad Mangalori later revealed in a detailed account how the composition of the delegation, how the memorandum and demands to be submitted had all been settled between Archbold, the principal of Aligarh, and Dunlop Smith, the private secretary to the viceroy. Nor, as Tufail Ahmad's account revealed, were the plans confined to India. Simultaneously, with the delegation being received by the viceroy in Simla, a series of articles began appearing in the British press in London – how India was not one nation, how it was not suited for democratic institutions, how Muslims were standing by the Empire, how Muslim statesmanship had pricked the bubble of the Bengal agitators...

The consequence – both immediate and eventual – were exactly as the British had intended. The former were captured well by the Secretary of State for India in London, John Morley. Upon receiving an account of the proceedings, he wired Minto: '*Morley to Minto* – October 26 – All that you tell me of your Mohammedans is full of interest, and I only regret that I could not have moved about unseen at your garden party. The whole thing has been as good as it could be, and it stamps your position and personal authority decisively. Among other good effects of your deliverance is this, that it has completely deranged the plan and tactics of the critical faction here, that is to say it has prevented them from any longer representing the Indian Government as the ordinary case of bureaucracy versus the people...' The 'people' would not now be seen as one. The situation would now be seen not as 'British Government versus the people of India' but as 'Hindus versus Muslims'.

The eventual consequence was captured just as well, by the Aga Khan who had led the 'engineered' delegation. In his *Memoirs*, he wrote, 'Lord Minto's acceptance of our demands was the foundation of all future constitutional proposals made for India by successive British Governments,

and its final, inevitable consequence was the partition of India and the emergence of Pakistan.’

What made the device so potent?

The key was to hold out a benefit which the Muslims could get *as Muslims*, which they could get because *they were different from*, and *only by remaining different from the rest*. Once such a benefit is introduced, politics, power revolve around that pivot. Those who want to lead the group compete as *leaders of that group*. They strive to outdo each other in *differentiating* that group and espousing the interest *of that group*. Competition does the rest: not just 10 per cent of seats but (10+X) per cent; not just separate electorates, a separate country...

The key is always that germ – a benefit which members of the group can get only by being different from the rest. When the criterion of that difference is race, religion, caste, language, sex, the severance of the group from the community is ensured to a certainty. In his book, *Modern Islam in India*, published in the 1940s when memories of the stratagem were fresh, W.C. Smith nailed the point. The separate electorates led Muslims, as they had been designed to lead them, he observed, ‘to vote communally, think communally, listen only to communal election speeches, judge the delegates communally, look for constitutional and other reforms only in terms of more relative communal power, and express their grievances communally.’⁴

The same stratagem was deployed for segment upon segment of our people. Recall M. Macauliffe’s observation in his well-known 1903 work, *A Lecture on the Sikh Religion and its Advantages to the State*: ‘At former (Census) enumerations village Sikhs in their ignorance generally recorded themselves as Hindus, as indeed they virtually were. With the experience gained by time, a sharp line of demarcation has now been drawn between Sikhs and Hindus...’ The Census was just one instrument. Sikhs were joining the army. Ceremonies were introduced in the army that would instill and widen the feelings of separateness among Sikh recruits.

As these efforts were going on to drag Sikhs and others away from Hindus, a parallel effort was on to whittle down the number of ‘Hindus’. The move preceding the 1911 census was typical of the manoeuvres. Provincial superintendents were instructed to enumerate castes and tribes that had been returned or classified as ‘Hindus’ but which could be said not

to subscribe to a given set of 'beliefs' or which suffered some disabilities. In each instance, the superintendents were to ask whether the caste or group

- Denies the supremacy of the Brahmins;
- Does not receive the mantra from a Brahmin or other recognized Hindu guru;
- Denies the authority of the Vedas;
- Does not worship the great Hindu gods;
- Is not served by good Brahmins as family priests;
- Has no Brahmin priests at all;
- Is denied access to the interior of ordinary Hindu temples;
- Causes pollution by (a) touch, (b) within a certain distance;
- Buries its dead;
- Eats beef and does not revere the cow.

Using these 'tests', the census officers were able to report for province after province how vast numbers did not fall within the circumference. The questionnaire ignited strong protests. Nationalists expressed alarm. Eventually, it was decided that the respondent shall be taken at his word: if he said he is a Hindu, 'Hindu' is what shall be recorded in the religion column.⁵

Tribals and the lower castes had always been the special target of both – the British administration as well as the missionaries. From the 1911 census itself, Scheduled Castes were taken out of 'Hindus'. It so happened that a number of Muslims and Christians returned a caste also. By the 1931 census, while 'Hindus' were to be split into different castes, and these large chunk – Scheduled Castes and Tribe – were to be reported outside the total of Hindus, no caste was to be recorded for Muslims and Christians! In a word, Hindus were to be split into fragments; Muslims and Christians were to be shown as single blocks.

A separate category was created to hive tribals out of Hindus—they were to be enumerated in the census as 'Animists', *not* Hindus. Successive census reports detailed the insuperable difficulty in separating Animism' from 'Hinduism'. They pointed to the result – the extreme fluctuations in the count of Animists'. They nailed the reason for these fluctuations: as Hinduism is a continuum of beliefs and practices, as it is an inclusive faith,

the enumeration has come to depend on the whims and ‘idiosyncrasies’ of the enumerators, the officials wrote. One after the other report counselled that the category be abandoned. But that was the one thing that was *not* to be done. Thus, while in the 1931 census ‘Animism’ was dropped, it was replaced by ‘Tribal religions’. This new category was triply useful. It reduced the proportion of Hindus in the population. Instead of being devoted to a miscellaneous collection of superstitions, each tribe now had a proper ‘religion’. And instead of there being just one category – ‘Animism’—there were now many, many ‘religions’. The separateness of tribals was given institutional form in the proposals in that other, command performance, the report of the Simon Commission. The exact same stratagem and sequence were repeated in the case of several other group – Satnamis, Kabirpanthis, Arya Samajis, and of course the Brahmos.... ‘India’ is not a country. It is a zoo....⁶

The stratagem of detaching the lower castes from Hindu society reached its apogee at the Round Table Conference. The British had diligently invited and most carefully selected ‘representatives’ of various ‘interests’ who would be available to neutralize Gandhiji. So much so that the prime minister was able to taunt Gandhiji – here are representatives of the princes, of Muslims, of the untouchables, of chambers of commerce and industry; whom do you represent? Gandhiji was quick as usual – the women of India!

The British primed their band of delegates. The last straw was the demand they engineered to parallel the Minto manoeuvre, the demand that they create a separate electorate for the Scheduled Castes. Gandhiji had all along been apprehensive of their design. He had been fighting it. In London on the sidelines of the Round Table Conference, he strained his utmost to counsel the key Indians on whom the British were relying for the purpose not to become instruments of the British stratagem. He was heartbroken as they went ahead and put forward the fatal demand that had already wreaked havoc – separate electorates for Scheduled Castes too. This is nothing but a ‘modern manufacture of Government,’ Gandhiji said, and told the British that he would resist it with his life.

He had but to leave Britain and the government announced the infamous ‘Communal Award’ decreeing separate electorates for the Scheduled Castes. Gandhiji was arrested upon his return to India. When all his efforts

failed to persuade the British and the Indians who had made themselves available to the British for furthering their design, he commenced his fast unto death. The British government had to rescind its 'Award'.

But Gandhiji had to agree to the 'Yeravda Pact' by which the Congress 'voluntarily' conceded reservations for Harijans in legislatures.⁷

That is the first lesson that a polity must bear in mind when it extends a benefit, when it launches a scheme, when it uses a criterion: politics congeals around whatever criterion is selected for state policy and programmes; interests get vested around it; relations of power, of patronage solidify around that criterion. If the criterion for reward is achievement, people strive and exert. When, as in the Gadgil formula, states that remain poor get higher allocations; if, as in the formula used by the Finance Commission, states that have higher deficits get larger subventions from the Centre, there will be that much less incentive to attend to governance. If the same overall amounts are distributed in accordance with the *improvements* that the states have affected, they will have a goad to improve, and thereby alleviate their problems as well as those of the country. If individuals and groups get rewards on the basis of their being *different* from the rest, leaders will foment a politics that exacerbates the difference. If the criterion for that differentiation is religion or birth as in caste, politics will whirl around, power will congeal around these, and the chasms in society will widen to the point of sundering.

Do W.C. Smith's words not describe to the dot the mentalities that have coagulated around caste in states like UP and Bihar, the mentalities that politicians there have stoked since V.P. Singh lunged for Mandal? One just has to replace 'caste' for 'communal' and the words fit precisely: 'The caste-based reservations have compelled groups to vote caste, think caste, listen only to casteist speeches, judge the delegates and officials by caste, look for constitutional and other reforms only in terms of more relative caste power, and express their grievances by caste.'

And the country has been set back. It isn't just that caste has been given a new lease of life. New 'castes' have been manufactured. After all, Scheduled Castes are not a 'caste' – they are the collection of castes that have been notified by sundry governments in a schedule under Articles 340 and 341 of the Constitution. Yet, listen to politicians who inflame 'Dalits'

—a word carefully chosen not just to identify a group but to instill in it a sense of grievance; and in the ‘Not Dalits’, a sense of guilt. Similarly, the ‘OBCs’ were not to be a caste at all: the framers of the Constitution scrupulously shunned the word *castes* in this context and used the expression ‘other socially and educationally backward *classes*’. But listen not just to politicians but to people in UP and Bihar and you will hear a new ‘caste’ – the ‘OBC. Nor is it just that new ‘castes’ are being created, casteism reigns: politicians stoke voters by caste; individuals see themselves as and other – for instance, officer – as members of this caste or that.

The very thing that was shunned becomes central

There are innumerable judgments in which the Supreme Court has declared that

- Every word used in the Constitution has significance;
- When the Constitution uses one word rather than another, it does so with due deliberation;
- This is especially so when it uses one word in one context and either omits it in another, or uses a different one in another context. For instance, if an article of the Constitution or even an ordinary law mentions that, before doing such-and-such, government would have to come back to Parliament, and another article or law does not say so, that omission is not put to inadvertence. That the requirement has not been mentioned in the latter case, is taken to mean that in this instance the government can decide on the matter without coming back to Parliament.

Against these propositions that judges reiterate times without number, put the articles in which ‘caste’ and ‘class’ are mentioned and you will see that the scheme of the Constitution is clear as can be:

- Except when it is speaking of Scheduled Castes, where it uses the word ‘caste’ the Constitution does so to lay down a negative; namely, that caste shall *not* be a ground for discrimination.
- Where the word ‘caste’ is used to single out a group for special care or measures, it is only in regard to Scheduled Castes.

- In regard to other matters and contexts, the word ‘castes’ is studiously shunned. The expressions that are used are ‘weaker sections of the people’ or ‘socially and educationally backward classes’.

Yet, today

- When leaders and political parties mobilize groups to demand reservations, they mobilize them as *castes*.
- When their case is urged before commissions, it is argued that they be given reservation as *castes*.
- When commissions examine the case, and eventually recommend that reservations be given, they recommend that reservations be given to such-and-such *castes*.
- When governments decree reservations, they are given to *castes*.
- The reservations that the courts uphold are reservations to *castes*.

How according to the courts must the ‘classes’ be identified? How are they identified in practice?

Here is what the Supreme Court says in a representative passage, this one from *State of Andhra Pradesh v. P. Sagar*:

Article 15 guarantees by the first clause a fundamental right of far reaching importance to the public generally. Within certain defined limits an exception has been engrafted upon the guarantee of the freedom in Clause (1) *but being in the nature of an exception, the conditions which justify departure must be strictly shown to exist*. When a dispute is raised before a Court that a particular law which is inconsistent with the guarantee against discrimination is valid on the plea that it is permitted under Clause (4) of Article 15, *the assertion by the State* that the officers of the State had taken into consideration the criteria which has been adopted by the Courts for determining the socially and educationally backward classes of citizens, *would not be sufficient to sustain the validity of the claim*. The Courts of the country are invested with the power to determine the validity of the law which infringes the fundamental rights of citizens and others and when a question arises whether a law which *prime facie* infringes a guaranteed fundamental right is within an exception the validity of that law has to be determined by the Courts on materials placed before them. By merely asserting that law was made after full consideration of the relevant evidence and criteria which have a bearing thereon, and was within the exception, the jurisdiction of the Courts to determine whether by making the law a fundamental right has been infringed is not excluded.

The High Court has repeatedly observed in the course of their judgement that no materials at all were placed on the record to enable them to decide whether the criteria laid down by this Court for determining that the list prepared by the Government conformed to the requirements of Clause

(4) of Article 15 were followed. On behalf of the State it was merely asserted that an enquiry was in fact made with the aid of expert officers and the Law Secretary and the question was examined from all points of view by the officers of the State, by the Cabinet sub-Committee and by the Cabinet. *But whether in that examination the correct criteria were applied is not a matter on which any assumption could be made especially when the list prepared is ex facie based on castes or communities and is substantially the list which was struck down by the High Court in P. Sukhadev's case.* Honesty of purpose of those who prepared and published the list was not and is not challenged but the validity of a law which apparently infringes the fundamental rights of citizens cannot be upheld merely because the lawmaker was satisfied that what he did was right or that he believes that he acted in a manner consistent with the constitutional guarantees of the citizens. *The test of the validity of a law alleged to infringe the fundamental rights of a citizen or any act done in execution of that law lies not in the belief of the maker of the law or of the person executing the law but in the demonstration by evidence and argument before the Courts that the guaranteed right is not infringed.*¹

Nothing could be more explicit: greatest care to be taken; criteria must accord with the Constitution; the say-so of a government will not be enough; the courts *will* examine the list....

And what happens in practice?

The commission that is scripture today

A volume can be readily compiled examining the work of commissions and committees that state governments have set up to draw up the lists of castes. That is scarcely necessary as we have a handy example in the locus classicus, indeed the scripture on the subject, namely the report of the Mandal Commission itself. How did that Commission identify the 'Other Backward Classes' whose cause it championed? What was the basis on which suddenly in 1991 – 92, instead of 22.5 per cent seats being assigned on the basis of birth, 50 per cent came to be assigned in that way?

The Commission is punctilious in setting standards. Criticizing the First Backward Classes Commission set up in 1953, the Mandal Commission notes that the Commission specified certain criteria for adjudging backwardness and then proceeded to list 2,399 castes as backward. 'But', it says, 'it is not clear from the report as to how the lists of backward classes were derived from the application of that criteria,' that 'in the absence of any explanation of the rationale for fixing different percentages for different groups of posts, etc., the approach appears somewhat arbitrary.'

And how does the Mandal Commission itself proceed?

It has to determine first what percentage of our people are ‘Other Backward Classes’.

But there has been no caste-wise enumeration of our population *since 1931*.

No matter. The Mandal Commission just assumes that the relative rates of growth of the population of different castes of Hindus have been identical. And thus concludes that SCs, STs and OBCs today are the same percentage of the total Hindu population as they were in 1931!

Even that does not settle the matter. For the Commission is determined to identify ‘Other Backward Classes’ among other religions too – religions which have been priding themselves on the ground, and whose propagandists for centuries have been running Hinduism down on the ground that, unlike Hinduism, they have no castes among them.

It is evident from the Mandal Commission’s report that there was no caste-wise enumeration of non-Hindus even in 1931.

No problem for the Mandal Commission.

It is just a matter of making one more assumption!

‘Assuming,’ the Mandal Commission declares, ‘that roughly the proportion of OBCs amongst non-Hindus was of the same order as amongst the Hindus, population of non-Hindu OBCs was also taken as 52 per cent of the actual proportion of their population of 16.6 per cent, or 8.4 per cent!’

Two assumptions and we have a conclusion.

‘Thus’, writes the Mandal Commission, ‘total population of Hindu and non-Hindu OBCs naturally added up to nearly 52 per cent (43.7 per cent plus 8.4 per cent) of the country’s population.’ QED.

So, the basis is nothing but the 1931 census.

The basis of it all

And what did the 1931 census itself say about the lists and figures of castes that it listed?

What is a caste? What distinguishes one caste that the census enumerator was reporting from another? ‘The term ‘caste’ needs no definition in India,’ the census reports. Could it be that we can get a

definition of the other two categories that the census use – ‘tribe’ and ‘race’? Can we get a definition of caste by looking at what it is not?

“‘Tribe’ was provided to cover many of the communities still organised on that basis in whose case the tribe has not become a caste,’ the census recorded. In a word, a ‘tribe’ is that thing which has not become the thing that needs no definition.

As for ‘race’, the census said, ‘no attempt was made to define the term ‘race’, which is generally used so loosely as almost to defy definition.’ ‘Nor is it intended to do anything so rash as to define it here, while in the Census Schedule its very looseness enabled it to cover returns which, though not strictly referable to the same category, were quite adequate for the purpose intended, which was primarily to obtain a return of Indians to whom the terms ‘caste’ and ‘tribe’ are inapplicable and a means of identifying Anglo-Indians whose birthplace might be an inadequate means of identification.’²

This procedure – definition by residual – presented many problems, and the Census was candid about them. For instance, it pointed out that Indians who had been classified as ‘tribals’ formed a very heterogeneous group. Even the simplest step – that of comparing these figures with what had been reported in previous enumeration – the census commissioner wrote, ‘has been made very difficult by the irritating practice of some missionaries to induce their converts to abandon their tribal name and return themselves nondescriptly as “Indian Christians”, as though they had some cause to be ashamed of their forefathers.’³

The difficulties were compounded by several factors, the census recorded. On the one hand were movement – especially influential in Punjab and Bengal – advocating that caste should not be enumerated as, by listing it, government was perpetuating and reinforcing an institution that was harmful; and, on the other, was persistence: even though some religion – Islam, Christianity, Sikhism – foreswore caste, caste, the census commissioner noted, was not ignored even after conversion.⁴

Blurring of boundaries

But the basic problem was that ‘the institution [of caste] itself is undergoing considerable modification,’ the census reported, “There is a tendency for

the limitations of caste to be loosened and for rigid caste distinctions to be broken down.’⁵ Indeed, this was the reason on account of which the census commissioner argued that enumerating persons by caste would not revive caste – the institution is in such flux that there is no danger that mere enumeration will revive it, he reasoned.⁶

There were several factors that were eroding the distinctions between castes, the census reported.

‘There is... apparently a tendency towards the consolidation of groups at present separated by caste rules,’ the census reported in passages that should be bookmarked for the time when we will turn to judges of the Supreme Court who write about the institution as if we are still frozen in the day – in fact, in the *pages* — of Manu. ‘The best instance of such a tendency to consolidate a number of castes into one group is to be found in the grazier castes which aim at combining under the term “Yadava” Ahirs, Goalas, Gopis, Idaiyans and perhaps some other castes of milkmen, a movement already effective in 1921.’ As typical of this movement it cited also ‘the desire of the artisan castes in many parts of India to appear under a common name; thus carpenters, smiths, goldsmiths and some others of similar occupations desired in various parts of India to be returned by a common denomination such as *Vishwakarma* or *Jangida*, usually desiring to add a descriptive noun implying that they belonged to one of the two highest *varnas* of Hinduism, either Brahman or Rajput.’ The census illustrated this tendency with a little table, one that is as telling a piece of evidence as anyone would need, that argues against the rigidity that our activists, politicians and even judges ascribe to the caste system, evidence that gives us a glimpse of the fluidity of the caste system even in the 1930s:

Some new ranks claimed by old castes

Old name	1921 claims	1931 claims
Kamar	Kshattriya	Brahman
Sonar	Kshattriya Rajput	Brahman Vaisya
Sutradar	Vaisya	Brahman
Nai	Thakur	Brahman

Napit	Baidya	Brahman
Rawani (Kahar)	Vaisya	Kshattriya
Muchi	Baidya Rishi	
Chamar		Gahlot Rajput

Of the two higher appellations, the census recorded, ‘Brahman was usually desired at this Census.’ But there were many variations: ‘in some cases a caste which had applied in one province to be called Brahman asked in another to be called Rajput and there are several instances at this Census of castes claiming to be Brahman who claimed to be Rajput ten years ago.’

And there was a mix of motives and objectives in demanding these changes: in part there was ‘a very proper desire to rise in the social estimation of other people’; there was also a political objective: ‘It [the movement for consolidation under a new, higher appellation] is also attributable in some castes to a desire for the backing of a large community in order to count for more in political life.’ About the criterion on which our caste-is-class progressives always insist, inter-caste marriage, the census recorded, ‘There is little evidence as yet that intermarriage is being practised within these consolidating groups, but,’ it added, ‘it is a development the possibility of which may not be overlooked, and the Census Superintendent of the Central Provinces quotes “specific instances... of marriage between members of different sub-castes of Brahmans, and between members of different sub-castes of Kalars, whose union would formerly have been condemned.”’

The census commissioner recounted the difficulties in ‘stating a caste in the case of inter-caste marriages’, adding a sentence half of which will fortify our progressive – “There is, however, a very marked repugnance in all the castes who have anything to say about the matter to being designated *sudras*’ – and half of which will dismay them – ‘though the term seems to have been quite respectable up to a comparatively recent date’. ‘On the whole it is fair to conclude that there is a tendency for the limitations of caste to be loosened and for rigid caste distinctions to be broken down.’ Enumerating caste at this juncture will help assess the social and economic condition of the person and the group, he wrote, adding, and this again bears testimony to the pace at which the boundaries were being eroded, ‘It

is possible that in another ten years it may be feasible to substitute some other criterion and it would certainly be desirable, if it were so feasible, to adopt for Census purposes some much larger grouping than that of castes.’ ‘Every Hindu who claims to be a Hindu at all would claim to be either Brahman or Kshatriya,’ the census recorded giving reasons why varna would be a poor guide in enumeration. ‘Even castes of Chamars in the United Provinces have dropped their characteristic nomenclature at this Census and returned themselves as Sun- or Moon-descended Rajputs,’ though on the observation of census officials, ‘This, of course, does not imply any correspondingly respectful treatment of them by their neighbours.’

But as far as enumeration is concerned, the difficulty was well-nigh insuperable: ‘It is obviously impossible for the Census authorities to do anything other than accept the nomenclature of the individuals making the return, since to discriminate and to allot to different groups would involve entering into discussion on the basis of largely hypothetical data. Experience at this Census has shown very clearly the difficulty of getting a correct return of caste and likewise the difficulty of interpreting it for Census purposes.’

Yet, that is the enumeration that the Mandal Commission, and following it courts as much as politicians and activists have taken as writ in stone. The census reproduced what the superintendent of census operations for Madras had written in this connection:

Sorting for caste is really worthless unless nomenclature is sufficiently fixed to render the resulting totals close and reliable approximations. Had caste terminology the stability of religious returns, caste sorting might be worth while. With the fluidity of present appellations, it is certainly not... 227,000 Ambattans have become 10,000... Navithan, Nai, Nai Brahman, Navutiyar, Pariyari claim about 140,000 – all terms unrecorded or untabulated in 1921... Individual fancy apparently has some part in caste nomenclature. For example, an extremely dark individual pursuing the occupation of waterman on the Coorg border described his caste as *Suryavamsa*, the family of the sun.

So widespread and difficult to pin down was this tendency that the census observed, ‘Many of the claims made and appellations used recall irresistibly the ruse of that hero of W.S. Gilbert’s who christened himself “Darwinian Man”.’

Nor should one forget the changes that were taking place at the base, in the mode of production as the Marxists would say – the spread of communications, as well as the wide sweep of the new trains and buses which were breaking down many of the taboos that were said to be characteristic of the caste system. And the effect of even these was complex, the census pointed out. When transport was rudimentary, when communications were primitive, a group that migrated to another place lost contact with its original social group. It in a sense, began anew. With easier transport, with better communications, the relationship survives, and so do some of the older practice – for instance, of marrying within the caste group.

For all these reasons, to get at a person's caste, the census gave up what had been done in the recent censuses, and reverted to the norm that had been used in the Census of 1891 – that is, of tabulating the 'traditional occupation' of the person, and ascribing a caste from that.⁷

From our point of view, there is a preliminary and obvious consideration. The base of the enumerations that are used today for reservations is the 1931 census. As castes were recorded in that census by asking a person about his occupation, why not use 'occupation' as the basis rather than 'caste'? That would be secular, non-denominational, wouldn't it?

The reasons this step is not taken are as obvious as the step itself. Caste-based politics would be set back. Moreover, occupations change, and at an ever faster whirl in today's modernizing economy – that would knock the bottom out of the vote banks that our 'secular' politicians build up. Third, with modernization, ever new occupations are coming up on the one side, and, on the other, they are ever more finely divided – into which box will a leader building himself on caste slogans put a man who is marketing a management programme?

But to proceed, going by a person's occupation and then ascribing a caste to her or him was the only practicable course for the census officers, and yet it presented several difficulties – difficulties that are even more disabling for reservationists who, after all, insist on deriving social status and handicaps from the mere name of a caste. The census commissioner recorded, "The difficulty of classifying by occupation is instanced by the

fact that cultivation in northern India is a most respectable occupation whereas in certain parts of southern India it is largely associated with the “exterior” castes and is consequently less respectable. Similarly the term “merchant” would cover all sorts of different social classes and units from the Gujarati *bania* to the gipsy Banjara.’ There were other changes that spoke of the loosening hold of rules that are referred to as immutable in our judgements and activist books. The census commissioner noted that while ‘in private intercourse, as in religious observances, the castes whose water cannot be accepted are held at as great a distance as before’, ‘it is conceded that the position of individuals belonging to exterior castes (that is, to castes hereto described as “depressed”’) has been much ameliorated as far as public life is concerned, and that untouchability has in that respect been very appreciably reduced.’

The method was not entirely satisfactory for other reasons also. How an occupation is to be distinguished from a ‘traditional occupation’ was not ‘always a non-contentious question’. Similarly, often one caste had more than one ‘traditional occupation’ – what is the ‘traditional occupation’ of Gonds, to use the example that the census listed? Basket making, scavenging or music?

Because of these difficulties, the Census Department itself would be relieved the day it could give up the caste-wise enumeration, the census recorded. It recalled a notorious theory – of adjudging by ‘the relative nasal index’ – and noted with satisfaction that the theory had in the event failed. But the results of that attempt had been as troublesome as if it had succeeded, recorded the census! ‘Every Census gives rise to a pestiferous deluge of representations, accompanied by highly problematical histories,’ it recalled, ‘asking for recognition of some alleged fact or hypothesis of which the Census as a department is not legally competent to judge and of which its recognition, if accorded, would be socially valueless. Moreover, as often as not, direct action is requested against the corresponding hypotheses of other castes. For the caste that desires to improve its social position seems to regard the natural attempts of others to go up with it as an infringement of its own prerogative; its standing is in fact to be attained by standing upon others rather than with them. For these reasons an abandonment of the return of caste would be viewed with relief by Census officers.’ The time for doing so, however, had not yet come, the census

commissioner noted. And added a proposal that showed the direction in which imperial thinking was proceeding. 'This question is one which it will only be possible to determine when the time comes, but if the exterior castes were to agree to return their religion or their community as "Adi-Hindu" or by some similar adventitious label, it might be possible even to omit the return of caste, while in any case it would afford a collective term which might make it possible to ignore individual castes for the purpose of tabulation...' ⁸

In any event, the multiplicity of names and occupations was so great that the local census offices were instructed to list only those castes which 'the local Government considered of sufficient importance'. The only exceptions were to be 'the exterior castes' and a dozen or so selected castes. The consequence? 'This has made it impossible to compile figures for all castes for all India,' the census reported.

The census, therefore, candidly recorded, 'The castes shown are representative only and not a complete tabulation of the whole population.' The total population of what was then India was estimated as 352.8 million. As against this number, the total number covered by the caste-wise table was 220.7 million. ⁹

The appellations

'The general adoption of so peculiar an adjective as "depressed" to define a body of people admittedly millions strong,' wrote M.W.M. Yeatts, the then superintendent of census operations in the Madras Presidency and soon to be census commissioner for the country, 'in itself indicates a far from precise differentiation. No final definition has ever been made so far of what constitutes "depression" in this singular application of the term.' *'What has happened in effect is that the category was created by saying that certain communities constituted it and thereafter communities have been added to or removed from the original list,'* he explained with a candour that our leaders would find embarrassing today. Nor ought this to cause surprise, Yeatts said: 'One need not wonder at the absence of any final and exclusive criteria, for too many elements enter to permit of rigid demarcation or definition.' ¹⁰

To explain how vexed is the problem, the Punjab report had thought fit to reproduce the remarks of the Census Report of 1891, adding that 'time has by no means brought about any mitigation of the difficulties.' The Census Report had said then, 'No one who has not gone into it himself has any idea of the extraordinary difficulty attending the whole subject.' Even though the caste and sub-caste had been returned correctly 'in a vast majority of cases', the report had explained, that 'still leaves room for an immense number of vagaries....' Among the sources of confusion it listed, were sub-caste being returned in place of caste; the name of the occupation being returned instead of that of the caste; or neither caste nor sub-caste being reported, 'or in fact every kind of confusion must be expected.' The pace at which the work has to be done, the pronunciation of the respondent, the comprehension of the enumerator.... 'A Bedi for instance (with a soft *d*) is a man of a saintly family, while a Bedi (with a hard *d*) is a thing of naught, whom we have to class with the Kanjars.'

Furthermore, the whole exercise was predicated on there being rigid lines of demarcation as between castes, and strict rules about marriage, inter-dining, etc. However, 'society is not solid but liquid,' Sir Denzil Ibbetson had pointed out in his report for 1881. The liquid in India has been much more viscous, he had written, adding, however, 'It is extraordinary how incessantly, in reporting customs, my correspondents note that the custom or restriction is fast dying out....' The census superintendent had also cited the 1911 report to the effect that 'My general conclusion is that there has been little change in the Province during the past thirty years with reference to the basis of caste distinctions, but that the restrictions have become very lax, the rules being disregarded with impunity with respect to inter-marriage and inter-dining, the traditional occupations are being given up owing to the functional revolution which is in progress, and general reaction has set in whereby members of lower or menial castes are trying to rise to the level of the higher ones, either by connecting themselves with a forefather belonging to one of those castes, or by discovering a new origin for their tribe or caste.'¹¹ In a word, continuous testimony of flux, of blurring from the reports of 1881, 1891 to 1911.

'To place each unit of Hindu community in his or her proper caste compartment under the correct sub-caste is today *a complete impossibility*,'

we are told in the report for the Bombay Presidency, ‘because – (a) No really complete index of castes and sub-castes has yet been compiled; (b) In too many cases, the individual questioned is either ignorant of his own caste or unwittingly gives a wholly misleading reply; (c) It is unreasonable to expect, from the type of enumerator now employed, the degree of vigilance, the breadth of ethnical knowledge and the patience and persistence necessary to obtain really correct information.’¹²

Giving a series of examples of how individual castes and sub-castes could continue to be split into smaller and smaller entities, the Mysore report stated, ‘the situation is full of anomalies and requires to be reviewed completely.’¹³

The census commissioner of Bengal and Sikkim reported yet another difficulty that had confronted enumerators filling the caste column: There is no separate word in Bengali and the Indian languages current in Bengal, he wrote, for ‘race’, ‘tribe’, ‘nationality’ and ‘caste’. There are all sorts of difficulties in addition, he reported. Agitation has been growing in volume to have people report no caste at all, he wrote. Furthermore, some respondents report sub-castes, some only the caste. In other cases the difficulties are well nigh insuperable: for instance, the Kashtriya caste is itself so ‘vague and indeterminate’ in Bengal, that when a respondent reports it, one does not know its significance. Even in regard to Brahmans, the effort to obtain sub-caste ‘proved no small embarrassment’, he reported. Lists of castes and sub-castes were prepared based on earlier accounts and studies and circulated for comments and verification, he reported; and added that the replies that have been received serve only to reveal the difficulties in making out a satisfactory scheme.¹⁴

In province after province – Central Provinces and Berar, Rajputana Agency and other – the census officers reported yet another impediment: even in trying to identify ‘exterior’ caste – those who were regarded as untouchables and were to be listed in the census as ‘depressed castes’ – the census officers reported that a sub-caste regarded as polluting in one district is not regarded as polluting in the adjacent district.¹⁵

Unable to rely on customs, beliefs and practices as criteria, census operations had taken the short cut and recorded caste on the basis of

occupation. But by the early 1920s, occupations were in flux. We have already noticed observations in this regard about the situation in Punjab, and even in the report of Sir Ibbetson for 1881. Change had spread to other areas. Its pace had accelerated. The census officers of province after province noted the transformations that were taking place in economic operations in their jurisdiction. The areas under the Rajputana Agency were among those in which change was the slowest, and yet even in the report for them we learn that ‘a report by traditional or general occupation would be valueless, for traditions are rapidly changing and in these days a Teli may be a merchant and a Rajput a mill operative.’¹⁶

‘It is not possible to estimate the extent to which the caste table has suffered as a result of these complications’, the report for Bihar and Orissa recorded. Among these complications was the factor to which we shall return in a moment – the sustained and strenuous efforts of many castes to use the census as the occasion to raise themselves socially. The problem here was twofold: the option could not be left to the enumerator to decide the caste to which the respondent belonged; but, ‘At the same time,’ the census superintendent for Bihar and Orissa added, given the inability of individuals to give a precise answer as well as the determination of groups to raise themselves, ‘the system of allowing so great a latitude to individuals in describing their caste will lead at no distant date, as increasing option is taken of it, to something approaching chaos in the Census figures.’¹⁷

Several of the census officer – of the Rajputana Agency, of Jammu and Kashmir, of Mysore – went to considerable length to describe the benign origin of the caste system and to stress that categorization was to be seen in other countries and societies also. Several of them pointed to the sense of security and identity that the system ensured. But there is little doubt that over time practices of the most distressing and shameful sort had come into being. Some of them can only be described as idiotic. These practices had become the basis for division and subdivision. But every single census officer reported that the practices were on the wane – that the lines distinguishing one group from the other were getting blurred, that members of one group after the other were crossing the line into other groups. In the Northeast, of course, the rigid divisions and ‘exterior’ castes were

unknown. 'It is impossible,' the Assam report recorded, 'to lay down a simple test to distinguish members of the Hindu exterior caste in Assam from others.' The report reproduced a note which had been originally prepared for the Indian Franchise Committee. The note had at length shown the inappropriateness of the expression 'depressed castes'. The officer had recorded, 'It will be noticed that I have not used the word "depressed" for any of these three divisions. I have done this advisedly because the word "depressed" is not, in my opinion, suitable as a description of the status of any caste in Assam. "Depressed" as used in India in connection with caste has come to be associated particularly with persons belonging to certain castes in Madras who are unapproachable, whose touch necessitates immediate purification and who are not allowed to read in the schools along with other boys. There is, I am glad to say, no such degree of depression in Assam; an unapproachable caste is unknown here and boys of all castes are freely admitted into all schools and colleges. Nor are there any difficulties worth mentioning as regards the drawing of water by all castes from public "tanks" and wells. Hence I would be loath to apply to any caste in this province an adjective which has come to connote an extreme state of degradation.' Given this situation, the correspondents were indeed at pains to explain how difficult it was for them to identify these exterior castes when 'the whole matter was so indeterminate'.¹⁸

Flux

'The adjective "fluid" has often been applied to the Hindu caste system,' the Madras report recorded, 'and with much appropriateness.' A fluid takes the shape of the vessel within which it is contained but does not alter in volume and quantity, it explained. In the same way, individuals and groups were retaining the essentials of the faith 'whereas the social incidents or customs' – the very basis on which one caste was being distinguished from the other, one sub-caste from the other – 'which are in essentials superficial, change rapidly.'¹⁹

'Everywhere there was stirring and men's minds were deeply moved to social service,' the census officer for Baroda recorded. The census officer reported that 'there is a good deal of activity amongst these for self-improvement and search after new caste-names to raise themselves in the

eyes of their fellows.’ He wrote of the *mandal* formed by a typical caste, ‘and an active, and somewhat obstreperous youth league formed amongst them,’ and how this had ‘made it hot for their elders to waste money on caste feasts on occasions of marriages and deaths....’²⁰

From Bengal, from Madras, from Baroda, the census officers reported movements towards erasing lines of demarcation between sub-castes and amalgamating castes. So much so that the Madras report said, ‘It is probable that the time has come when the elaborate caste detail which has adorned or as some would say congested the past Census reports should be given up.’ Individual fancy; the desire to amalgamate under an encompassing name – ‘Yadava’; the urge for ‘cacophonous combinations’ – all compounded the difficulties. With the result, Yeatts wrote, ‘sorting by caste is one of the most complicated of all Census operations. The tables require a prolonged and careful check, and in the end it is doubtful whether in the famous phrase it is worthwhile going through so much to get so little.’²¹

Emigration was affecting the estimates in a major way. This presented a problem of its own: variety in nomenclature is present to such a pronounced degree as to shatter any possibility of estimating individual caste contributions to immigration and emigration, the census officers reported. Moreover, there was a tendency among groups to use alternate ‘euphemisms’. This drove the census officers to near distraction, Yeatts recorded, ‘Energy expended in pursuing euphemistic caste synonyms bears a strong resemblance to that involved in hunting a will-o’-the-wisp and is as profitable. Sorting for caste is really worthless unless nomenclature is sufficiently fixed to render the resulting totals close and reliable approximations. Had caste terminology the stability of the religious returns, caste sorting might be worth while. With the fluidity of present applications, it is certainly not. Censuses can deal usefully with facts, not with fashions.’²²

The Baroda report spoke of a concerted and determined pursuit of consolidation. The ‘*Vaniar*’ has become the representative custodian of commercial interest, it said. The farthest advancement in this direction has

been visible in the consolidation of ‘agrarian’ interests under the *Patidar* ‘which is fast developing into a national caste.’²³ And so on.

Each of these reports listed a series of factors which were propelling change.

Propellers of change

The reports of province after province listed a host of factors which were accelerating these tendencies – the blurring of boundaries between castes, the diminishing rigour with which caste rules were observed, the diminishing authority of caste organizations that could enforce the rules.

Even for an area like Assam which was much less affected by change, the census report thought fit to reproduce an account written earlier about the effects of ‘the extraordinary economical revolutions taking place in India and all over the world’, about how ‘it is well known what radical changes in a hill area may be produced by a single bus route, by a handful of Mohammedan traders, by the example of some Hindu workmen...’ People were astir all round. Associations were active to raise the status of their group, to get their members to improve their economic position, to agitate for special scholarships and representation in government services. There was a new confidence. Shudras were refusing to carry sweetmeat baskets for Brahmins; they were refusing to carry brides and bridegrooms aloft chairs; they were refusing to carry *palkis*; the ‘brotherhood of the *hookah*’ was being ‘silently extended to the cleaner and more educated section of the lower castes’, though social recognition of the extension was still in the future; on the other side, high-caste men were seeking employment as cooks, clerks, and *gomasthas* in the shops of low-caste men...

And there was an all-important new tide – the nationalist movement. ‘This spirit – the spirit of freedom, of liberty, of being one’s own master – has, I consider, developed considerably during the last decade,’ the census superintendent reported. “The *Swaraj* movement and the growing sense of nationalism have directly fostered this feeling and political events have had a profound effect upon social development. A more liberal spirit is abroad – especially among the younger generation – in matters appertaining to caste and, particularly in towns, the bonds of caste have been relaxed to an

appreciable extent.’ Naturally, the process of relaxation has been slow, he continued, and it is not that a system that had lasted a thousand years would evaporate so swiftly. But change, there was: the Congressmen do not observe caste rules, he quoted a professor as reporting, England-returned youth are now readily admitted into society. ‘Rigours of untouchability are also vanishing due to the liberalizing influences of the time, including frequent railway journeys. A Brahmin would not formerly touch an untouchable, and if he did so accidentally he would purify himself by bathing. Nothing like that is done now-a-days.’ Students of all castes were living and eating together in hostels..²⁴

The report contained a map depicting the communal composition of different parts of the province. Introducing it, the superintendent remarked, ‘Had such a map been prepared only forty years ago, it would have been very different from the present map. The green patches (Muslims) in the Assam valley would have been hardly noticeable and the pink hachured sections (Christians belonging to hill tribes) would have been so small that they would have been difficult to find. In 1891, for example, the Muslim percentage of the population of Kamrup was 8.7 per cent, today they form 21.6 per cent of its population; forty years ago the Muslim percentage in the population of Nowgong was 4.1 per cent, today it is 31.6 per cent. As for the Christians, I need only mention that in 1891 the total number of Christians in the Lushai Hills was 15 (probably all Europeans). In 1894 the first missionaries arrived there and half the population of the district is now Christian.’²⁵ Changes of the same order were being caused by the establishment of tea gardens, the migration of labour from Bihar and other areas.

Migration was loosening rules, it was erasing boundaries: in a typical observation, the report on Central Provinces and Berar noted the fact of ‘large depressed communities in various districts who are not regarded as impure when they move into other parts of the country’.²⁶

Better communications; the railway; the motor lorry; education – especially of girls; newspapers and periodicals; the influence of social reformers, and of leaders like Mahatma Gandhi and Jamnalal Bajaj, and their ‘fiery crusade’ against caste; of progressive rulers like the Maharaja of Mysore; political movements and campaigns, especially the participation of

women in these; the way those who had suffered imprisonment in political cases were liberated from caste rules; each of these was propelling change, it was hastening the erosion of caste boundaries, the relaxation of caste rules.²⁷

And not just in caste boundaries and rules. To glimpse the change that was afoot, glance at this, a typical passage about the position of women in Bihar, of all places:

The last ten years have seen a marked change in the position occupied by women. The spread of female education is mimical to the perpetuation of the *purdah* system, and there is no doubt that the increasing participation of women in political controversy has accelerated the process of emancipation. There are other influences at work, too. Indians who have been abroad for educational or other purposes and have mingled in a society where both sexes stand on an equal footing return to this country with a new outlook on such matters. On their part and on the part of many of their countrymen who have never left India there is a growing demand for social accomplishments in their brides and a growing impatience with the conventions that stand in the way of their acquisition. One can, however, detect a certain hesitation or lack of enthusiasm – a grudging acquiescence, as it were – in the attitude of the more orthodox towards these modern tendencies. A Muslim correspondent from Orissa writes: ‘A girl of average family tries to live in a more up-to-date way than her antiquarian comrade. The imitation of false show of fashion, though not a healthy sign, is still an advancement nowadays.’ And again: ‘A record of the names of females as voters in the voters’ list, *although they never go to record their votes*, is another healthy sign.’²⁸

Self-improvement movements had commenced among all sections, in particular among the lower castes. Caste associations were pushing reform within their castes even as they were petitioning for favours from government.²⁹

Official policies of the government – from the encouragement that was being given for setting up schools open to all sections to the extension of law, and the establishment of police and civil administration and in particular of courts, the institution of elections in panchayat – were weakening the hold of caste and the authority of caste panchayats.³⁰

Above all, there were the changes that were being wrought by the introduction of machinery, the establishment of factories, the ebb and flow of economic events. Several reports recorded that several of the caste rules had their roots in the uncleanness of some tasks that had to be performed –

scavenging, the rearing of pigs, etc., were often cited. As these had become more hygienic, the very basis of ostracization was being eroded, they noted. The professions were themselves getting more and more splintered, new professions were coming into being so that the old categories no longer fitted the new realities.

The report from the Nizam of Hyderabad's dominions, spoke of a 'caste upheaval'. 'Besides social and religious upheavals, there are equally powerful economic forces at work, slowly undermining the Hindu caste system,' it continued. "The introduction of machinery and labour-saving devices has revolutionized the theory that caste is essentially a functional division on the lines of medieval Western trade guilds. The rigidity with which son followed father's occupation is weakening. Brahmans are turning their hands to agriculture, trade, medicine, law, and almost every other conceivable occupation. Chamars, Dhers and other kindred castes are giving up their traditional calling and are engaged as labourers in fields and factories, rubbing shoulders with high-caste men. Education and means of communication have played no small part in making the caste system flexible and adaptable. In view of such changing circumstances the enumerators are least competent to discriminate individual castes.'³¹ 'A return by traditional or general occupations only,' the superintendent for the Rajputana Agency wrote justifying the caste column in the enumeration, 'would be valueless, for traditions are rapidly changing and in these days a Teli may well be a merchant and a Rajput a mill operative....'³² The report for Jammu and Kashmir gave a typical illustration. The Thakkars had been treated as a separate caste in earlier censuses, it noted. The distinction between them and the Rajputs 'was based mainly on occupation and customs, the former taking to agriculture as their main occupation while the latter regarded service as their domain. The Rajputs treated agriculture contemptuously and refused to inter-dine or give their daughters in marriage to Thakkars.' But now, "The traditional occupation having lost its significance in modern times the better minds of the communities awakened to the need for solidification and accomplished the fact.' The Thakkars had completely disappeared as a separate caste from the census.³³

The observations in the report of a conservative area like Mysore were even more telling. 'In regard to occupations, it is doubtful if there was

severe restriction at any time,' the report recorded. 'Even now children of artisans, unless they have been sent to undergo higher education, follow the occupation of the father. Nothing however prevents the father holding land and cultivating it and the son going in his wake. Nothing, also, prevents or has ever been understood to prevent a young man of any community receiving education and adopting some other profession.' 'An occupational question closely related to caste would arise when a man of what are called the higher castes takes up what are considered as impure trades,' the report noted. But even in this regard change had commenced. 'A Brahmin or Kshatriya would not ordinarily work as barber or washerman or boot-maker. Under existing conditions however, these people may supervise establishments where work of this kind is done and sometimes may take a hand in the work itself. The superior men in the caste may dislike the idea of these people working in such occupations but public opinion at present does not consider such persons impure.'³⁴ The census report for Bihar and Orissa narrated the effects that the works in Jamshedpur were having: 'conditions of life in modern industrial centres are incompatible with a strict observance of caste distinctions,' it recorded, and cited the observations of the subdivisional officer who reported that, while inter-caste marriages had not till then increased, 'there has been a distinct weakening of caste government and a development of toleration. Many of the castes have abandoned traditional occupations and all classes are found working together in an industrial process, and I am informed that in many cases castes who, in their own village, would avoid each other drink out of the same receptacle and eat in the other's presence.' These developments did not imply that the caste system was about to break apart, the superintendent said, but that there are signs of 'greater laxity' even in regard to marriage which were unheard of in the census report of 1921.³⁵ The Punjab report drew attention to the effects of urbanization: while inter-caste marriages were still 'very limited', 'inter-dining has become more widespread.' More significant, "The tendency among lower classes to rise in the social scale is obviously on the increase,' the report recorded, 'and in towns particularly it is quite easy for a low caste person to claim a higher caste without any fear of detection.'³⁶

Nor was it just that new occupations were coming into being; nor just that factories, schools, towns put people adjacent to each other. The effects were compounded by the ebb and flow of modern economic life. 'New castes have come into existence from time to time,' we read in the report for Baroda. 'Once formed, they appear to be inexorable, but the fact that the formation is possible shows that the system admits of change and is capable of adapting itself to new conditions. Particularly is this the case with the occupational groups, which still cling tenaciously to their old callings. Where modern conditions have rendered their employments unprofitable, enterprising individuals have drifted away from their present castes to new trades or have taken to the land. Thus are formed new castes, Kadia-Kumbhars, Luhar-Sutars, Sutar-Luhars and Kumbhar-Sutarias....'³⁷

In 1921, the census commissioner for the state recalled, he had wondered whether, in the face of change that was all round, caste would adapt itself and 'be content to remain as it were the 'election agent of the new democracy'. 'But since then events have moved rapidly,' he recorded. His account is worth reading for several reasons: it is typical; it bears testimony to what was afoot; it explodes the kind of hyperbole that we find even in judgments of the Supreme Court – *Indra Sawhney*, for instance – in which judges declaim as if we were still in the time of Manu, in fact in the time in which they think India must have been because something is written in Manu! Here is what the census commissioner wrote:

The press of political stimuli together with the general urge of self-expression has released powerful forces which had hitherto been held in leash by the social discipline of elders. We have mentioned the increasing measure of democracy in caste movements. But the institution itself has been undermined mainly in three ways. The pressure of population on the land has driven multitudes of landless manual workers to herd in towns. This has resulted in enforced mixing of all sorts and classes in industrial groups and under factory conditions. Caste restrictions of commensality and exclusive living have been therefore considerably relaxed in towns. Inter-marriage between different castes, 'a wanton practice', as one of my correspondents called it with severe austerity – has hitherto been prevented, but restrictions even here are breaking down through love marriages or illicit unions. Secondly, dissatisfaction with the traditional calling has thrown on the market thousands of men and forced them to take to occupations for which they have had no ancestral bent. Thus the Patidar has become a cooly for unloading of cargo in ports and harbours, while the Brahman has taken to tanning. The Vania has become a motor mechanic, while even the Bhangi has contributed his humble quota to the teaching profession. This tendency has become a potent influence for disintegrating caste restrictions. Thirdly, the desire of inferior

orders to claim kinship, and even adopt, the names of higher castes, has become a very powerful movement within recent years. So many have clamoured for the Rajput name, that it is doubtful whether even high-born Rajputs can now much enthuse over their own traditions. The incursion of Valands, Sutars, Sonars and Luhars into the exclusive Brahman fold can only result in a *reductio ad absurdum* of the caste system and of its immemorial dignity, 'just as the creation of a large number of peers must inevitably reduce the prestige of the House of Lords.' (G.T. Garratt, *An Indian Commentary*, page 20.) If these disintegrating influences become still more powerful in the future, as it is inevitable that they will, castes will no longer be the mainspring of the Indian party system. In themselves they will be no more inimical to national fusion than are trade unions. They will simply help to resolve, by adapting new political institutions, Indian society into horizontal divisions, rather more rigid perhaps in the beginning than their prototypes in modern European countries. Judged in that view, the development of caste is decidedly in the direction of nationality, while its anti-social features are being overthrown, or at least controlled, by a genuine movement in social service, literature and art throughout Hinduism, giving definite evidence of its '... ability to rise to the heights which the new political forms will demand. In recent years, the cry 'Back to Hinduism' has not meant a return to the old *dolce far niente*; it has meant the extraction from Hinduism of powers latent in it but hitherto dormant. It is the demand for Hinduism to stand on its own legs, the demand for action and positive service. The wonderful results that have already shown themselves in the very short period of active Hindu nationalism lead one to hope that, with the attainment of a self-reliant manhood, Hinduism may have many more good things to give.' (R.N. Gilchrist, *Indian Nationality*, page 137.)³⁸

And there were the ever-effective poles to vault over restrictions: wealth, power, the proximity to power. The increased fluidity in economic affairs brought wealth to ever-newer individuals and groups. Talking of the increasing instances of marriages between sub-castes, the correspondent from Orissa wrote to the census superintendent, 'Money works in these cases as a mighty leveller of sub-castes. If a member of the lower sub-caste acquires money, power or authority, he marries into the immediately higher sub-caste and gradually becomes amalgamated into it.' He proceeded to give instances of sub-castes which were getting amalgamated upwards in this way, and observed, 'This is not due to any relaxing of the rules of inter-marriage or commensality. These rules are as hard and inexorable as ever; but, as social rules have lost their sanction and their binding force, people never fear or scruple to violate them whenever it suits them to do so. The man of power and pelf can shut the mouth of the caste people with gold and break the social rules with impunity.'³⁹

The changes ran so deep, they were so pervasive that, while the official position remained that caste enumeration had to be done as caste was still a

factor of great significance in Indian social life; that such enumeration even had its use – it helped focus the attention of governments, of caste leaders on things that needed to be done for those who were backward; that, while there were difficulties, the returns were in the large reliable, several of the census officials wrote that enumeration by caste should be given up, that in any case the elaborate detail in which the data was being tabulated should be abandoned. In addition to all the factors that have been mentioned was the increasing tendency of individuals and groups to adopt and devise caste names that caught their fancy. Several of them manufacture ‘cacophonous combinations’, Yeatts wrote from Madras. As a result, he said, as we noted, ‘Sorting by caste is one of the most complicated of all Census operations....’⁴⁰ The Assam superintendent was more explicit: ‘The returns of caste are undoubtedly getting less accurate at each successive Census and it seems extremely doubtful whether it is worthwhile collecting and publishing statistics for any castes except for those which are known to be likely to be accurate.’ Giving examples, he wrote that there was no difficulty in collecting figures for Ahoms, ‘but when it comes to castes like the Kayasthas, Mahisays, and Patnis I confess that the figures appear to me to be worthless and not worth the trouble of collecting.’⁴¹

That is what officers in charge of enumeration the last time there was a caste-wise count recorded, and yet today, we have the assertion – that caste ‘X’ accounts for ‘Y’ per cent of the population in district ‘Z’; that ‘X’ is an OBC while ‘Y’ is...; even that caste ‘X’ voted for the Congress and ‘Y’ inclined towards the Samajwadi Party in the UP municipal elections... To recapitulate:

- There has been no caste-wise enumeration since the census of 1931;
- In that census, officer after officer wrote extensive accounts of the fluidity that had come to mark the caste system – how the lines between castes were getting blurred, how caste rules were getting to be disregarded, how the new economic and technological developments were upsetting the very basis of caste divisions;
- Since then, each of the factors that were propelling the changes has got accelerated manifold, and many new factors have entered to spin the whirl even faster;

- By contrast, journalists and pollsters declaim with such confidence, ‘Our Exit Poll shows that Kurmis have deserted Congress and are flocking to ‘ Not just politicians, even judges talk as if India is what it was, in fact what some text collated over 700 years says it should have been twenty-five hundred years ago.

India?

In *Indra Sawhney*, Justice B.P. Jeevan Reddy maintains that the ‘caste-occupation-poverty’ nexus remains intact in the country. That someone who was born into the caste of barbers may become a washerman ‘would indeed be a rarity,’ he says, ‘it is simply not done.’ “There may be exceptions here and there,’ he allows, ‘but we are concerned with the generality of the scene and not with exceptions or aberrations.’ Again, there may have been ‘some dilution’ of the nexus in some urban areas, but in rural areas ‘it is strikingly apparent,’ he insists, and ‘since rural India and rural population is still the overwhelmingly predominant fact of life in India, the reality remains.’⁴²

First, over 25 per cent of our population already lives in urban areas. Second, look just at the physical mobility of Indians today – we make five *billion* journeys just by rail every year; yes, five *billion*, five *times* our total number: can it be that even as a person violates what were supposed to be caste rules about eating, about drinking water, of touching and being touched by, can it be that even though he violates these throughout these journeys, there is no residual effect upon his life? Can it be that the millions who migrate to other places – to Punjab from Bihar, for instance – for work, return unchanged? But, more significant, the manner in which even ‘traditional occupations’ are conducted has undergone a sea change: a person may still be a farmer, but the zeal with which he has been adopting new varieties of seeds; the way he has been teaming up with others to demand and wrest more power and water for his fields; the new avenues he has found for marketing his crop; the way he has been throwing governments into office and out, can it be that, even though he is, in Justice Reddy’s prism, still doing his traditional occupation, he is the same man, caught in the old, unchanging ‘caste-occupation-poverty’ nexus?

You will notice a telling disconnect here. The ones who insist on such notion – an unchanging India in which people are mired in unchanging

nexuse – are the very ones who, with that smattering of Marxism, will recite how social relationships are governed by the ‘mode of production’. Yet, while throughout the length and breadth of the country, that ‘mode of production’ has changed to an enormous extent, and is changing at an ever-faster pace, they insist that social relationships and social conduct remain mired in the ditch of the past, indeed in the ditch of what *they* insist the past was!

And the lengths to which they will go to maintain that ‘the reality remains.’ In *Indra Sawhney* itself, a judgment written in 1992 – 93, Justice Ratnavel Pandian pictures India as follows:

...In this (Tinnevely) district there is a class of unseeables called *purada vannas*. They are not allowed to come out during day time because their sight is considered to be pollution. Some of these people who wash the clothes of other exterior castes working between midnight and day-break, were with difficulty persuaded to leave their houses to interview, [sic].⁴³

The judge is moved. ‘Does not the very mention of the caste named ‘purada vannas’ indicate that the people belonging to that community were so backward, both socially, economically as well as educationally beyond comprehension [sic]?’ ‘Would the children of those people who were not allowed to come out during day time have gone to any school?’ the judge demands. ‘Does not the very fact that those people were treated with contempt and disgrace as if they were vermin in the human form freeze our blood? Alas! What a terrible and traumatic experience for them living in their hideouts having occasional potluck [sic] under pangs of misery, all through mourning over their perilous predicament on account of this social ostracism. When people placed at the base level in the hierarchical caste system are living like mutes, licking their wound – caused by the deadening weight of social customs and mourning over their fate for having been born in lower caste – can it be said by any stretch of imagination that caste can never be the primary criterion in identifying the social, economic and educational backwardness?...’⁴⁴

Firstly, assume the description to have been true: it certainly does not reflect ‘the reality’ of India – not of the Punjab from which I come, not of Nagaland or Assam or of Bengal where caste has never had much of a presence, not of... In *every country*, and *at all times* we will find such

idiocies. Such an extreme aberration said to exist in one corner is presented as if it correctly portrays the ‘reality’ of India as a whole. On the other side, the enormous changes in occupations, the mobility – physical, social, economic; the earthquakes those very millions who are said to be hidebound wreck by overthrowing their rulers, all that is dismissed as exception, indeed as ‘aberration’.

Second, from where does Justice Pandian get that ‘evidence’? From the Mandal Commission’s report. And from where does that Commission get the ‘evidence’? From a book, *Rise and Awakening of Depressed Classes in India*, by an author Justice Pandian describes as ‘the noted and renowned sociologist’. And what source does that renowned author cite for the fact? A cutting from *The Hindu*. Of what date? Of 24 December 1932! And we must believe that this represents the reality of the whole of India today! Indeed, to such an extent does it represent reality that it must form the basis for state policy today. To such an extent must it determine state policy that the clear and emphatic command of the Constitution, that caste be shunned, must be disregarded!

There is another aspect of such assertions that has far-reaching operational consequences. The sentences that follow Justice Pandian’s mourning exhibit it. ‘Can it be said,’ he says in justification of his prescription, namely that backwardness must be identified by looking at the person’s or group’s caste, ‘that the propagation and practice on the caste-based discrimination, the marked dividing line between upper caste Hindus and Shudras, and the practice of untouchability in spite of the Constitutional declaration of abolition of untouchability under Article 17 *are completely eradicated and erased* ? Can it be said that the social backwardness has *no* relation to caste status?’⁴⁵ In a word, the test is *complete eradication and erasure*, the test is that caste should have *no* bearing on social status. And the evidence is a cutting from *The Hindu* of 1932!

‘...The Indian society has, for ages, remained stratified,’ Justice Sawant writes, ‘... it consists of mobility-tight hierarchical social compartments. Every individual is born in and, therefore, with a particular caste which he cannot change...’⁴⁶ A moneyed smuggler has a higher standing in society, in politics than the greatest Vedic scholar; people bow and scrape before a minister – be he just the minister of the moment – more than they do before

the most chivalrous warrior; do they go by the caste of that smuggler or minister or by the possibility – howsoever remote! – that they can get more out of these fellows than they can out of that scholar or warrior?

After the usual cliché-ridden ‘history’ of the nature and evolution of our society, Justice Sawant concludes with the righteousness customary of such pronouncements, “The concentration of the executive power in the hands of the select social groups had its natural consequences. The most invidious and self-perpetuating consequence was the stranglehold of a few high castes over the administration of the country from the lower to the higher rungs, to the deliberate exclusion of others. Consequently, all aspects of life were controlled, directed and regulated mostly to suit the sectional interests of a small section of the society which numerically did not exceed 10% of the total population of the country.’

It is a measure of the extent to which we have internalized such clichés that no one would even think of asking for, and the judge would not even think of pointing to any empirical basis for these assertions. As this was all, on the judge’s telling, a result of Hinduism, did this state of affairs continue through *the thousand years of Islamic* rule? Was it in the interest of the Islamic rulers also to administer the kingdom in such a way that only these upper castes benefited? If so, why? There is no answer, of course.

But I am on the sentences that follow, for, while the judge’s diagnosis merely reinforces self-debasement, these lead us to the policy prescription that these progressive judges advance: “The state of the health of the nation was viewed through their eyes [that is, the eyes of the high-caste rulers and controllers], and the improvement in its health was affected according to their prescription’ – this presumably throughout the thousand years of Islamic rule also, throughout the rule of the British also, both sets of rulers having gone the last centimetre to crush the priestly and warrior castes in particular, and with particular savagery as they saw that these were the castes that would constitute a challenge to their rule, that they were the impediment not just to the spread and consolidation of political power but to the spread of their religion also. Why is it that throughout these thousand years too, ‘The state of the health of the nation was viewed through their eyes, and the improvement in its health was affected according to their prescription?’

The judge continues:

It is naïve to believe that the administration was carried out impartially, that the sectional interests were subordinated to the interests of the country and that justice was done to those who were outside the ruling fold.

Precisely. Who were the ones who were thrown out of the ‘ruling fold’? Were the sectional interests of the new rulers not advanced by fomenting distance and animosity among sections of the community? But that is not all. The judge concludes his little survey of India’s political and social history with a triumphant declaration:

*This state of affairs continues even till this day.*⁴⁷

A glimpse into what happened

When judges decide to leaven their decisions with sociology and history, should they not acquaint themselves with primary sources? Should they not take the trouble of assessing evidence? To take just one example, in his important work, *Growth of Scheduled Castes and Tribes in Medieval India*, Dr K.S. Lal makes a telling point.⁴⁸ The Islamic invaders prevailed because of the weakness of the Indian state system – in particular, the organization, equipment, training, tactics of our military forces. After that defeat, Islamic rule prevailed for a thousand years. It was oppressive in the extreme – rights remained only for those who embraced Islam and accepted the rulers, and even then were subject to the predilections and idiosyncrasies of rulers, the vagaries of campaigns and the rise and fall of dynasties. Yet India did not become like the countries from Syria to Afghanistan, countries that converted wholesale to Islam, Lal points out. Had the Indian social system been as oppressive as these judgments make it out to be, the state system having given way, millions would have embraced Islam.

The contrary happened. By the time Islamic invasions entered the interior of the country, the traditional warrior – Rajputs and the rest – had exhausted themselves in internecine warfare, and in the dogged struggle they waged against the invaders during the first few centuries. From the accounts of Muslim chroniclers and official histories, K.S. Lal documents in detail that thereafter and right to the end of Islamic rule, far from welcoming Islamic conquerors as liberators, the ‘lower castes’ and ‘tribes’ – Jat, Mina, Meo, Bachgoti, Baghela, Tomar, Barwaris, Gonds, Bhils,

Satnamis, Marathas, Oraons, 'Shudras', Gujars, Kunbi – are the ones that put up the most determined resistance to the invaders.

And there was much vertical mobility in the social set-up – persons and groups 'rose' into and 'fell' from one caste into another. How we forget! Chhatrapati Shivaji was nominally from a 'lower' caste: Maratha. The fist of his army was from two 'low castes', Maratha and 'Kunbi'. Would anyone grudge him or his valiant soldiers the most exalted status – by caste or adoration? Similarly, groups ascended to higher status by the valour and other attributes that they exhibited.⁴⁹

The savagery itself of the invaders would have been enough to make people flee as far as possible: twenty lakh are estimated to have been killed in the invasion of Mahmud Ghaznavi alone. But there was another reason. The groups that fought the invaders had to take refuge in inaccessible forests and mountains, they had to flee to ravines like those of Chambal. The alternatives were manifest: being butchered; being captured and deported to Afghanistan and beyond to be sold as slaves; being taken as slaves within India; abandoning their religion and embracing Islam. Others took refuge in the forests and mountains to escape the extortionate exactions of the Islamic rulers: successive rulers appropriated anywhere from half to three quarters of the produce from farmers. Indeed, the operating rule, stated in so many words, from the Khiljis to Aurangzeb, was to leave in the hands of farmers no more than was absolutely necessary for subsistence of the farmers and seeds. On occasion, the collectors took more than the entire yield in a year; that is, even what was left over from the previous year's crop was confiscated. The Islamic chroniclers and European travellers themselves furnish accounts of peasants having to sell their wives and children to meet the exactions of the collectors. The only escape was to flee to the forests.

Again, Muslim chroniclers themselves attest that life in those inaccessible forests was 'very hard', and these people were reduced to 'living like wild beasts' – living off roots and leaves and such fruit as they could find. This cruel cycle – of resistance, flight to forests, the subhuman existence there, forays to harass and beat back the conquerors, flight back into the forest – lasted a thousand years. That is how several of these groups lost their high civilization: Lal gives accounts of Muslim historians and

chronicler – accounts triumphal for them, heartbreaking for u – about the high civilization and the great wealth that the Gonds, for instance, had attained; and how, as a result of the resistance they put up to Muslim rule, they were reduced to penury and backwardness, how they had to flee to the forests so that today they are counted among ‘tribals’ and ‘backwards’.

The ubiquity of such groups arises from two factors. First, resistance was offered by groups all over the country, it was offered throughout the thousand years. Second, and that is difficult for us to imagine today, forests were everywhere: Dr Lal recalls Ibn Batuta writing of rhinoceroses in the jungles of Allahabad; he cites Abul Fazl reporting how Akbar hunted leopards 30 – 40 km from Agra; he cites Barani’s account of Mewatis leading forays against Balban and his kingdom from jungles to the immediate south-west of Delhi....

These are the phenomena that account for the enormous increase in the number of those whom we today know of as Scheduled Castes and Tribes. Hardly any Muslim chronicler and historian of the period asserts that the ‘lower castes’ were embracing Islam because some high caste was oppressing them. On the contrary several of them record how different castes lived together, and peaceably. One after the other among them pours special venom on the ‘lower castes’ for being the most determined resisters to the spread of Islam. All this is evident from the memoirs of the emperors themselves, from the accounts of Islamic historians themselves. Yet, our judges repeat the cliches.

Nor is it the case that Islam enabled those who converted to enter some egalitarian Utopia. Quite the contrary. And we do not have to look farther than the judgments themselves. What is the ‘reason’ these very judgments give for extending reservations to Muslims, for instance? What is the reason they give for overturning so central a theme of the Constitution and its maker – that such concessions shall not be given along communal fault lines? The ‘reason’ the judges give is that castes continue among Muslims to this day. Is this also because of Hinduism? Or because, as K.S. Lal shows, Islamic rule never aimed to, nor did it in fact, catapult people into some egalitarian Utopia?

True, judges are concerned with law. Their job is not to write treatises on history. Precisely. All the more reason that, when they decide to

‘substantiate’ their findings and policy prescriptions by assertions about our history and society, they must do more than repeat clichés.

The other side of the coin is equally important. Before using hyperbolic pejoratives to describe how oppressive Indian society has been for ‘thousands of years’, and basing the most far-reaching policy prescriptions on that construction, should the judges, who quote a sentence or two from *Manusmriti*, not adduce evidence to establish, first, that the half a dozen verses that are cited again and again are representative of the work; second, that the *smritis* are intrinsic to Hinduism; third, that the kind of oppression and differentiation that these verses imply actually prevailed in practice?

Manusmriti is said to have been compiled over seven to eight *hundred* years. Which verse is authentic and which an interpolation? Second, what is the evidence that this text was in fact being lived out in practice? Even the ‘eminent historians’ who have built their careers on such assertions have not been able to point to any evidence that even vaguely suggests that Indian society was characterized by the tales of caste oppression that are their stock-in-trade.⁵⁰ With these ‘historians’ unable to adduce any evidence to substantiate their assertions, on what do the judges base their characterizations? And yet, not only do our judges repeat the assertions, they do so in grandiloquent prose, and they base their policy prescriptions on those very assertions. Third, is any text that prescribes differentiation in tune with the central doctrine of the religion? The central doctrine embodied in the *mahavakyas*: *aham brahmasmi, tat tvam asi sarvamidam khalu brahman...*? When each being has a soul; when that soul is common to all; when the soul is the same as the immanent-transcendent reality that pervades the universe, how is any text that ordains differentiation in harmony with the religion?

Again, I am not for a moment suggesting that dissection of religious and philosophical texts is the proper province of judges and courts. They invite the charge precisely because they, in fact, make assertions about these texts, because they snatch a sentence or two from these texts, because they base their prescriptions on that snatching.

‘But look at marriage,’ the reservationists argue. ‘People still marry only within their caste. That shows that change is just on the surface. Where it matters, caste rules.’ Look at the Germans, say, look at the Japanese, the

Chinese. Tabulate data about their marriages. Is it not the case that, ‘The overwhelming proportion of Germans, of Japanese, of Chinese marry other Germans, Japanese, Chinese respectively?’ In any case, as Justice Sahai says in *Indra Sawhney*, this trait of a community has no relevance to public employment.⁵¹

The race then, and the one now

There was another trend, and so prominent was it that the census report of every single province highlighted it. Among the lower castes, there was a race to get recognized as a higher caste. Caste after caste was shedding practices that were associated with the lower position. Caste after caste was adopting, and making sure that all concerned noticed that it had adopted practice – even those that were retrograde – of the higher castes. Caste after caste was using the census enumeration as an occasion to advance its claim to higher status.

In which direction is the race headed today? How do the following observations of the census officials compare with what has been wrought by reservations, and the politics of reservations?

Even in the census report for 1921, the census commissioner had observed that, given the importance that caste had in determining a person's civil condition, it had been difficult for the people 'to appreciate that the object of the inquiry was merely to ascertain the numbers of each caste; and the ancient tradition that the King or the Government was the ultimate authority in determining questions of caste probably helped the popular feeling that the effect of the Census record, so far as the individual was concerned, would be to fix his particular position in the social scale. The opportunity of the Census was therefore seized by all but the highest castes to press for recognition of social claims and to secure, if possible, a step upwards in the social ladder.' A new factor had given impetus to these efforts: caste *sabhas* had begun to be formed, and the sabhas were now petitioning the government. By 1921, the movement to organize castes had

made much progress, and so the number of representations had multiplied, and the insistence with which they were urged had intensified.¹

Reporting on the 1931 returns for United Provinces, the superintendent of census operations, A.C. Turner, remarked that while in earlier censuses representations had come mainly from individuals, 'Since 1921 the *sabha* movement has developed to such an extent that all save the most backward castes and tribes now have more or less well-organised societies, who bombarded me until long after the tables were printed with requests for new caste names.' He proceeded to list the claims that had been advanced by different castes to this effect: the list covered three full sides of the foolscap pages of the census report and contained names of sixty-three castes and the claims they had advanced. In every single instance, the claim was that the caste deserved to be enumerated as a *higher* caste – Ahar as Yadava, as Yadava Kshatriya; Aheria as Hara Rajput; Ahir as Kshatiryas of varied superscripts; Banjaras as Chauhan and Rathor Rajput; Barhai as Dhiman Brahman, as Panchal Brahman, as Vishwakarma Brahman; Bawaria as Brahman, period; Bhotia as Rajput;... Chamar as Jatav Rajput;... Gadaria as Pali Rajput; Gujar as Kshatriya;... Jat as Jaduvanshi Thakur;... Kayastha as Chitragupta vanshi Kayastha, as Kshatriya;... Lodh as Lodhi Rajput;... Nai as Nai Brahman, as Pande Brahman;... Patwa as Brahman;... Taga as Tyagi Brahman.... One after the other, sixty-three castes, the list alone taking three full pages.... The point here is that *each* of them was aspiring to be and demanding to be elevated to a *higher* place in the social hierarchy.²

'Hindu caste claims provided as plentiful a crop as usual and amongst the perennial contentions there also appeared a number of new varieties not previously exhibited in any Census,' wrote A.E. Porter, the superintendent of census operations in Bengal and Sikkim. All were as usual to some name implying a superior position in the Hindu hierarchy of social groups.' And each group was backing its claims by arguments that were in many ways touching: 'In some cases, the *varna* claimed is alleged to be that of the caste concerned merely because in one of the *shastras* the name or function of the caste appears within that *varna*. In other cases, a somewhat similar name is seized upon in the holy books and the existing name of the caste is derived by fanciful etymology as a corruption of the original name, whilst a myth or theory, generally supported by no historical research or evidence, is put

forward to explain the fact that the caste (given a respectable affiliation in the *shastras*) finds itself now struggling against a degraded position in the heretical non-Aryan land of Bengal...’ And each claim was fortified by statements from pandits... Even in allocating castes as between shudras and the rest, there was a difficulty, Porter recorded: neither the caste nor the strict differentiation existed ‘at all in earlier times when the caste rules were not rigid but arose only after a degree of exclusiveness had been introduced into the caste groups which was not contemplated in the scriptures themselves by reference to which it is now sought to reach a decision....’ The census recorded the list of claims and claimant – of forty-four castes, each for upgradation: Baidya to Baidya Brahman;... Chamar to Satnami;... Gop to Yadava;... Kayastha to Kshatriya;... Koiri to Koiri Kshatriya;... Kurmi to Kurmi Kshatriya;... Sutradhar to Vishwakarma Brahman;... Yugi to Rajbangshi;... Rajbangshi to Kshatriya;... Yugi to Yogi; Vaidik Baishnab to Satvata Brahman.³

Every census officer was confronted with the charge that by asking people to state their caste, the census was perpetuating a system that had come to contain much evil and ought to be scotched. But caste has been there long before the censuses started, they pointed out. The evils have little to do with the census. The job of the census is to portray things as they are, not the way they should be. Moreover, look at the fervour with which people, especially of the lower castes, look to the census as an opportunity to improve their status, they pointed out. Does this not show that caste *is* important; that people do not object to being asked their caste; that, in fact, those most in need look upon it as an occasion to improve their lot? The arguments could easily be turned around: the very fact that they looked upon the census as a useful occasion to get themselves registered in a higher slot showed that enumeration by caste in fact perpetuates that identity, etc. But for the moment, the point that is relevant is the direction the representations were taking. “The feature of interest,’ A.H. Dracu and H.T. Sorley, the census superintendents for the Bombay Presidency, pointed out, ‘is that *the claim is always for a more dignified title, for admission to a higher caste or exclusion from a caste which is considered low in the social scale* and is rarely based on any argument of obscurity or any inaccuracy in the form of description adopted.’ Sainis and Malis wanted to be classified

as Saini Rajputs; Gabits as Marathas; Bedas as Naiks; Blacksmiths as Panch Brahmins; Barias as Kshatriyas; Talpadas as Padhiar Rajputs; Devalis and Bhavins as Naik Marathas; Beldars as Kumavat Kshatriyas; Lingayats as Lingi Brahmins; Kirars as Maheshwaris....⁴

‘The entry of caste in the Census schedules is, in fact, the one entry which gives rise to difficulty at the time of the Census and is invariably the subject of a large number of memorials submitted by members of various castes to the Local Government, to District Officers and to the Superintendent of Census,’ C.S. Mullan recorded in the case of Assam. He drew attention to the ‘most mysterious fashion’ in which, in each successive census, the numbers of Patnis, a caste that had been agitating for a new name that would upgrade it, had been ‘melting away’. ‘Far be it from me to re-open on this occasion or even refer to the old feuds which still exist among various sections of the Hindu community regarding their claim to a more exalted origin than would ordinarily be admitted by their social superiors. All I need say is that the old tendency to use the Census as an opportunity to press for recognition of social claims was just as pronounced at this Census as in 1921.’ Napit were memorializing government to be rechristened ‘Nai Brahman’; Namsudra were asking to be renamed ‘Nam-Brahman’...⁵

One census report after another exclaimed that people had come to regard the census office ‘as a sort of College of Heralds’, that they had transferred to it the ancient prerogative of kings to recognize them as part of one caste or another. ‘At the 1931 Census this crop was rather richer than usual,’ W.H. Shoobert, the superintendent for Central Provinces and Berar, remarked. ‘Many of the applications aimed high,’ he observed, and gave a selection of the claimants and their claims: Nai to Kulin Brahman; Bhat to Brahm Bhat Brahman; Panchal to Vishwa Brahman; Vidura to Parashar Brahman; Lunia to Lunia Kshatriya; Mahar to Kashyap Rajput; Gond to Kshatriya Surajwansi; Chamar to Satnami... ‘The foregoing catalogue shows that several castes which had hitherto been classified as untouchable claimed Rajput origin,’ Shoobert noted. He drew attention to transmutation of beliefs too. The Chamars have asked for recognition as ‘Satnamis’ by caste, he pointed out, adding, ‘This is an example of the genesis of a caste whose origin is based entirely on the religion of its members. The Satnamis

are in fact a religious sect but as the local Government had in 1926 decided that Satnamis should be shown as a separate group in the next Census returns, the classification had to be accepted. It is interesting however to recall that one of the original doctrines of the Satnami religion was to deny the supremacy of Brahmans and to deny the distinctions of caste' – an observation that shows several things simultaneously: the effect of a governmental decision in fomenting claims; the transmutation of a doctrine; the usefulness of even such a category in enabling a lower group to raise itself in the eyes of others and in its own eyes.⁶

In the Rajputana Agency states, the memorials were fewer, the census office remarked, than in British India 'for in the former any undue precocity for social recognition outside an accepted sphere would be severely dealt with as it was in England up to the end of the nineteenth century.' Even so, several caste sabhas had sent representation – each memorial was for recognition into a higher nomenclature: Daroga as Rawana Rajput; Nai as Kuleen Brahman; Sevag, Rankawat and Bhojak as Brahman; Khati or Sutar as Jangida Brahman; Mali as Sainik Kshatriya; Kurmi or Kunbi as Kurmi Kshatriya...⁷ What a far cry from our day when the Jats of Rajasthan have at last *won*, and got themselves listed as a *backward* caste!

The report for Jammu and Kashmir also listed the claims of a number of castes, including the ones very low down in the scale, to be recognized by a higher appellation, 'the aim in each case being to shoot as high as possible'. Nayees as Nayee Brahmans; Bhats as Bhat Brahmans; Jhewars as Kashyap Rajputs; Kurmis as Kurmi Kshatriyas; Chippi, Darzi, Chapegar as Rohela Tank Kshatriyas; Lodhis as Lodhi Rajputs; Chamars as Chandarbansi Rajputs...⁸

The list for Baroda, modern Gujarat, covered two pages: Anjana Kanbi to Rajput; Dhed to Vankar; Baria to Rajput; Kaliparaj to Raniparaj; Kanbi to Patidar; Luhar to Panchal Brahman; Mahar to Mayavanshi Rajput; Sonar to Daivadnya Brahmans; Sutar to Vishwakarma.... Again, in one and every case, the memorial was for recognition to a more honorific station.⁹ And we will just come to what a judge of the Supreme Court has to say about what the policy of reservations has pushed the people of modern Gujarat to demand today.

In Bihar and Orissa, the Babhans demanded that they be enumerated as Bhumihar Brahmans; the Barhis and Kamar/Lohars as Vishwakarma Brahmans; the Hajams and Nais as Nai or Kulin Brahmans; the Baraiks as Jadubansi Kshatriyas; the Dosadhs as Gahlot Kshatriyas;... the Julahas as Sheikhs and Sheikh Momins... The claims had been ‘pertinaciously advanced’, W.G. Lacey, the census superintendent remarked. “The list is not exhaustive,’ he cautioned, and gave an illustration: ‘It makes no mention, for instance, of the Pasis, whose unrivalled proficiency in tree-climbing is said to have encouraged them to claim a title meaning “the Brahmans who go up in the air”.’ ‘It will be seen that, so far as the Hindu castes are concerned, the general desire is to be recognized as Brahmans or Rajputs in some form or other....’ Lacey went on to explain how the numbers got affected not just by claims, not just by the statements of individuals, not just by the campaigns of caste organizations but in addition by the predilections of enumerators....¹⁰

The 1911 census had attempted to tabulate castes on the basis of social precedence, Khan Ahmad Hasan Khan, the superintendent for Punjab recalled. “This attempt could not be expected to succeed in view of the fact that nearly all castes consider themselves to be most exclusive and high-born’ – and what would several of them claim today? Nais urged that they be counted as Brahmans or Rajputs; Mirasis claimed they were really Qureshis; the Lohars and Tarkhans claimed they were Dhiman Brahmans.... ‘Thus,’ Khan noted, ‘on the present occasion more than ever before a tendency was noticeable in various localities, particularly among the occupational castes, to return a higher caste.’ And he had discovered a special reason behind the demands of some of them: ‘One of the main reasons was a desire to be included in one of the agricultural tribes, such as Jat or Rajput, and thus to secure exemption from the provisions of the Punjab Alienation of Land Act.’¹¹ Another tiny reminder that a governmental policy or programme or law has but to be designed in a particular way and it ignites a particular type of conduct.

Under the section entitled ‘Caste upheaval’, the census commissioner of the Nizam’s dominions, remarked, ‘During the few months preceding Census enumeration I was overwhelmed with memorials from various communal and caste associations....’ The memorials had followed the same

pattern, they reflected the same premise – that the census office was ‘a herald’s college’; they expressed the same aspiration – to be anointed as a higher caste.¹²

‘It is curious what great trouble leaders of several communities are prepared to take to prove their title to a new name,’ the superintendent for Mysore remarked. ‘Texts are quoted from various scriptures, extracts brought out from *Sannads* and *Kharithas*, and records of old discussions, relevant and irrelevant, copiously referred to. There seems to be a feeling in these cases that the associations that go with the old name are unpleasant. Sometimes the community feels that it really has a status in society which is denied in the old name. By the use of the new name such communities wish to regain lost position or divest themselves of unpleasant associations.’ Contrast this route with the insistence today that ‘Scheduled Caste’ and, of course, ‘Harijan’ be *not* used, and instead the members of these groups be called ‘Dalits’ – ones who are crushed.

There were two sides to these demands, the superintendent observed. ‘As indicating rising self-respect among the communities these attempts should be wholly welcomed. It is good that every community should feel that its status is high and desire to live worthily of that status. If by adopting a new name the level of life in the community is likely to rise, there ought not to be any opposition to the new name.’ In other instances, he noted, the attempt was ‘pathetic’ – as the leaders who exerted so hard to elevate the name did little to raise the level of life of the community...¹³

Violent fluctuations

One consequence of these demands and their acceptance was that the numbers under different castes fluctuated, report upon report recorded, ‘violently’. The census commissioners and superintendents remarked on these fluctuations with a mixture of amusement – for the fluctuations reflected the social system of the people who had been put in their charge – and exasperation – for they affected the reliability of the figures, of figures that our reservationists take as cast in scripture.

‘A glance at the figures,’ Yeatts wrote comparing five successive censuses, ‘shows that pronounced or even wild oscillation is almost the rule, its violence far transcending any possible effects of normal forces.’ It

isn't just that the figures were swinging this way and that. 'Indeed, this table shows up vividly *the uselessness of caste enumeration*. When caste names are shed like garments there is little point in an enumeration which must perforce go by name. The sole value of this table is in its illustration of the fluidity of caste nomenclature and the meager value attachable to the individual caste totals.'¹⁴ And yet for the reservationists today, the figures are gospel.

The Ambattans reflected the 'wildest variation of all', Yeatts recorded: they were 227,000; they have become 10,000 – flown to other castes! The precipitate decline in the number of Gollas is to be explained by the swelling in the number of Yadavas. The rise of Kalingi 'represents probably the fall in Kalinji.... The missing Kalians and Maravans are probably for the most part concealed below some recondite honorific and the Mangalas' fall is due to the same reason as has practically wiped out Ambattan. Vaniyans are half their 1921 figure.... The Telugu washermen show a steady increase but at a rate much below that of the region they chiefly favour. Their Tamil co-professionals show a fall of 20 per cent. In both cases the probable explanation is in some fancy name that has obscured the facts...' Yeatts' amusement at this liberating effect of the census continued: the Chakkiliyan seems content, he noted; however, 'his fellow leather worker of the north has not escaped the contagion, for Madigas have diminished apparently 16 per cent. More pronounced decline however is apparent in their hereditary enemies, the Malas, who have shed a million, while in the south the Paraiyans have dropped *We* millions and the Totis have practically disappeared...'¹⁵

Shoobert gave similar instances in his elaborate report on demographic developments in the Central Provinces and Berar. 'Kunbis have for the last ten years shown a growing tendency to call themselves Marathas,' he wrote, explaining the 'noticeably low' growth in their numbers. 'There is absolutely no reason to suspect that this yeoman caste is not increasing proportionately to the rest of the population and the rise of 370 per cent since 1901 in the number of Marathas clearly proves what has happened.' In other cases too the same phenomenon was evident: 'The rise of 82 per cent in the number of Mhalis, the barber caste of the Maratha plain, more

than accounts for the very limited increase among the Nais with whom they were probably confused at earlier Censuses,' Shoobert explained.¹⁶

The position was no different in other jurisdiction – we have already noticed, for instance, 'the most mysterious fashion' in which some communities were melting away in Assam.

With reservations expanding by the year, the reader need hardly ascertain that each and every one of these castes whose sabhas had then successfully agitated to be included into a caste higher in the social scale has, since, successfully agitated to be enrolled as a Scheduled or Backward Caste!

Abandonment and adoption of customs

There was yet another phenomenon that was beginning to have effects, and which, if it had been allowed to continue, would have had revolutionary social effects. The census officials of province after province reported that, to get themselves recognized as a higher caste, the caste that thought it was low in the scale was abandoning customs and practices which were associated with backwardness.

We have renounced eating beef, the tribals said in support of their claim to a higher caste, we have given up liquor.¹⁷ Lower castes were refusing certain kinds of labour in Assam – carrying sweetmeats, carrying palanquins. They began to wear the sacred thread. They made a conspicuous effort to ensure that their habitations were more hygienic. They gave up rearing animals that the others considered unclean – such as pigs. They gave up wine and tobacco. They began to observe fasts on given days. They began to reverence the cow. They gave up eating the carcass of cattle. They began worshipping the idols that the higher caste persons worshipped. They began to put off the marriages of their girls to a reasonable age. They began to reduce expenditures on marriages and funerals. They made a determined effort to take to better occupations. In much of this, the caste associations that had been formed did pioneering work.

So intense was this movement towards 'Sanskritization' as it was later to be called that, in their anxiety to establish that they belonged to such-and-such higher caste, the aspirants began to adopt some of the practices which, as the census officers noted, 'enlightened Hindus are coming to regard as

retrograde' – they gave up widow remarriage; some adopted purdah; some began to refuse food cooked or served by castes that were even lower down in the scale, castes from which they were trying to distance themselves...¹⁸

And now

That apart, the striving was for upliftment, for getting one's group being accepted in a higher notch. For this purpose a determined effort had begun to shed customs and occupations that were unhygienic, and unacceptable. And since? Gujarat illustrates what is happening now.

As we will notice elsewhere, the Bakshi Commission had based its lists of 'backward classes' on caste. Agitations of such severity had followed that the Gujarat government had to appoint yet another commission, the Rane Commission.¹⁹

The extensive tours it undertook and the heaps of representations it received, vividly brought home to the Commission what reservations on caste basis were doing to society. 'Some of those castes which are now clamouring for being considered as socially and educationally backward,' the Commission observed, 'were till recently claiming a higher place in the caste hierarchy' 'The manner in which representatives of some of the castes who appeared before us, had submitted their cases for treating the caste to which they belonged as socially and educationally backward, shows that organised efforts are being made to set the clock back by attaching various types of labels of backwardness to their castes,' Justice Rane and his colleagues recorded. 'We feel sad to find that the very castes which were at one time claiming for [sic] higher ranks in caste hierarchy and showing progressive trends, have now reversed the process and submitted before us that they are socially and educationally backward.'

The Commission nailed the turning point, 'the roots of the above change in their outlook': the report of the first Backward Classes Commission which prepared a list of 2,399 'backward castes', and the subsequent concessions that were given to the castes that had been so anointed. 'It appears that, in view of various types of concessions and adventitious aids which include reservation of seats in educational institutions and of posts in services under the state that are going to be given to socially and educationally backward classes..., ' the Commission recorded, 'there has

been a total change in the outlook of a large majority of castes in Gujarat and they have made organised efforts for being considered as socially and educationally backward in order to acquire eligibility for receiving various benefits that are being given for socially and educationally backward classes by the state.'

I.P. Desai, the sociologist who was a member, in his concurring note to the report of the Commission, drew attention to another telling fact: even where the occupation of a person or group was one he or its members had pursued traditionally – say, hair-cutting – the web of relationships in which it was conducted had entirely changed. The old *jajmani* relationships had been replaced by contractual relationship – between the employer, the owner of the salon, and the barber, between the latter and the customer.

'We have found that some of the castes, just for the sake of being considered as socially and educationally backward, have degraded themselves to such an extent that they had no hesitation in attributing different types of vices to and associating other factors indicative of backwardness of their castes,' the Commission recorded. Representatives of such castes, the Commission noticed, 'submitted their cases in an exaggerated manner.' A representative characteristic they claimed as an affliction which entitled them to be recognized as backward was drunkenness – this in spite of the fact that the state had, and has prohibition! 'It is extremely doubtful whether,' the Rane Commission observed, 'but for the temptation of being considered as socially and educationally backward, they would have attributed above blemishes [sic] to their castes.'

For all these reasons, the Commission emphatically decided against using caste as the criterion for assessing backwardness. Using it would perpetuate the evils of the caste system, it emphasized. While our Constitution makers aimed at creating a casteless society, the method of identifying backwardness has accentuated caste awareness and caste politics, it reported. 'We are firmly of the view that caste system has been hindering our progress towards an egalitarian society and that identification of backward classes in terms of caste will perpetuate the above evil,' it said. 'If caste was made the unit for identifying backwardness,' I.P. Desai wrote in his concurring note, 'we would be legitimising the caste system by State action as the British and pre-British Indian rulers did, while it is definitely not what it was say even 40 years ago.' Unfortunately, all commissions that

have been assigned the task of identifying groups to whom special concessions and facilities should be extended 'were too much possessed by caste,' Desai wrote. Today occupations are not being looked upon as 'pure' and 'impure', but as 'physically clean' and 'physically unclean'.

'It is, therefore, advisable as far as possible,' the Commission concluded, 'to identify socially and educationally backward classes in such a manner that those falling within such classes need not have any cause to temptation for humiliating their castes by attributing various types of shortcomings and vices to them, in their anxiety to ensure that the label of backwardness sticks firmly to their caste.' And there was another advantage, the Commission noted, of identifying backwardness independently of caste, on the basis of occupation, for instance: when criteria such as occupation are used, 'the label of backwardness on an occupational basis could be cast off by a person at his will, by hard work and dealing with the problems of occupation and life in an intelligent and practical manner; whereas the label of caste and the stigma of backwardness that may attach to a person, in case the caste to which he belongs is identified as socially and educationally backward would stick to him till his death.' In fact, using criteria other than caste 'would provide an incentive to those belonging to castes which are considered inferior to cast off the stigma attached to their castes without any delay.'²⁰

And that is precisely the reason why our casteist politicians do *not* want the classification to be on any basis other than caste! The group they want to inflame and frighten would then graduate out of victimhood!

The nebulous made solid

M.W.M. Yeatts was by now census commissioner. Work had been going on for the 1941 census. He had decided that the census would no longer attempt any record of castes. Questions began to be raised about this decision. The home member, Sir Reginald Maxwell¹ himself was unhappy. A master at 'Divide and Rule', he knew only too well the usefulness of the count. But Yeatts held his ground – for a while. When in 1939 queries were sent to him about the omission of caste and suggestions advanced for inclusion of new item – sources of livelihood, income levels, etc. – he recorded how every additional item increased the expense of enumeration and even more so of tabulation. Moreover, he wrote back on file, 'To seek detail for detail's sake is the great pit into which statistician – and the public who pursue them – so often fall. I am determined that the Indian Census should avoid this.' 'Apart from the intellectual reasons condemning such a practice,' he added, 'there is the important consideration that the Indian Census has reached perhaps the limit of manageability from the point of view of cost and possibly, unless care is taken, from the point of view of dimensions also. If detail is thoughtlessly added, a noble and historic undertaking may be swamped in it.'²

He was told that some provincial governments had raised objections to the omission of caste. Yeatts, therefore, decided that broad categories would be tabulated: 'Brahmins', 'Other Hindus', 'Scheduled Castes', and 'Primitive Tribes'. Maxwell was not satisfied. It is not clear whether the census commissioner means only that caste will not be *tabulated* or that it would not even be enumerated, Maxwell recorded in a detailed note, nor 'why he classes scheduled castes and primitive tribes as "among Hindus"'. If

this were the case (1) 'Brahmins' and (2) 'Other Hindus' would be the only two categories.' He cited the opinion of 'a majority of Provincial Governments' that caste is 'so much built into the social structure that it could not be omitted and that although some Governments seem to refer only to the broad divisions of the Hindu social structure others obviously contemplate a recording of castes in detail, and this opinion must have due weight.'

A meeting was consequently held between the home secretary, Conran Smith, and Yeatts, and eventually between them and Maxwell. The question in the 1941 census would be the same as in the 1931 census, it was decided. The answer that the respondent gives is what will be recorded. The question of whether the data would be tabulated caste-wise will be decided later, depending on the finances that become available for the census, and the cost that such tabulation will entail. The record of the meeting added, "The H.M. [Maxwell] expressed doubt regarding the classification of scheduled castes and primitive tribes among Hindus.' 'It is possible for a person to belong to the scheduled castes and also profess the Hindu religion,' it was explained, 'but the questions are distinct and will be answered separately.'³

A conference of census officials was convened. In his note to the home secretary reporting the conclusions of the meeting, Yeatts wrote, 'As the Home Department are aware I regard the treatment of caste on any detailed scale as having passed outside the range of census competence or financial possibility. I had hoped to be able to express this in the form of a question but the existence of a strong desire in the western provinces for a return of Muslim tribes and importance of securing a correct return of the primitive tribes in other parts of India, has led me to the conclusion in which the conference concurred that the form of question should be "race, tribe or caste".' Logically, this question alone should be asked, he wrote, the total for Hindus could be obtained by adding up the caste figures. But the general feeling at the conference was that 'the omission of the religion question at this stage would be misunderstood.'

Hence, two questions would be asked: 'race, tribe or caste', and 'religion'. 'I wish to emphasise however that I have no intention proposing tabulation of anything beyond the broad categories, Brahmins, other Hindus, scheduled castes and primitive tribes, among Hindus, if indeed

even that is done,' Yeatts wrote, words from which it would seem that he was sticking to his guns in the main. The next sentence, however, betrayed the extent to which Maxwell's Machiavellian pressures had worked: "The community totals of course will be shown, i.e. Hindu, Muslim, Scheduled Castes etc., etc' – that is, Scheduled Castes would be *taken out of* 'the total for Hindus. If any more detail is required, the province would pay for it.

In the event, the questions remained as they had been in the 1931 census. And the onus for the continuation of the caste enumeration was put on the Hindus! When Bhai Parma Nand asked questions about this in the Assembly, the note for Maxwell's reply maintained, 'The inclusion of caste in the questions regarding the Census is not a new thing, and without the mention of caste a section of the Hindus, who may be keen on the preservation of the caste system or want to record their numerical strength for the purpose of special franchise or other considerations, may have reasonable grievances.' Given this *potential* grievance, 'It follows, therefore, that the only impartial course is to retain the column for caste. It will then be for those sections of the Hindus who are averse to recording their castes not to reply to this query, as the standing instructions require the recording of only the answer given by the citizen. A person who does not reply to the question about caste can thus secure his own object without putting to inconvenience another section of the community.'⁴

By the time the census was actually undertaken, Britain was immersed in war. The exercise, therefore, necessarily had to be less elaborate.

But, in addition, two factors that had cast hurdles in 1931 worked further to persuade the authorities to give up caste-wise tabulations all together. As M.W.M. Yeatts, the census commissioner, noted in his final report, the movement not to ascribe a caste to oneself had gained ground – 'an interesting phenomenon at this Census was the widespread refusal of Hindus in Bengal and to a less extent elsewhere to return any caste at all,' the census report recorded in Yeatts's review of the 1931 census operations. Second, there were the difficulties that Hutton had recounted in detail: the new census commissioner said that he had nothing to add to the account of Hutton in this regard, and seemed relieved that the totals were not being made at the all-India level. It had been decided that if any province or private authority wanted caste-wise enumerations and tabulation – because

of jobs in government being distributed on this basis, for instance – it would pay for the work.

Categorization by religion too had led to much tension and pressure, especially in Bengal and Punjab. ‘So long as the political system is based on separate electorates,’ Yeatts observed, ‘this question is difficult and even dangerous.’ ‘In one major city, Lahore,’ Yeatts observed, ‘communal passions were violent enough to destroy the value of the enumeration record.’ ‘If joint electorates come in, much of the difficulty will be avoided. If not, then early thought must be given to the means of securing a valid record.’ Of course, it was not for Yeatts to record that separate electorates were instigated and instituted by the same British government for whose edification the review report was being written.

Two observations in passing give us a glimpse of long-lasting pursuits of the British administration. ‘*Religion* should go,’ Yeatts wrote, ‘and the single community question be put as was suggested ten years ago by Dr Hutton.’ ‘The only case where religion is important is where members of tribes, *e.g.*, have been converted to Christianity. Indian Christians are a recognized element in the country and its political system; consequently they should be considered as a “community” for the purposes of the community table. On the other hand, tribal origin is a circumstance of great importance which should find a record....’

The other observation concerns the enumeration of ‘Race, tribe or caste’. The category is one of the oldest in the census returns, Yeatts noted, and ‘yet misconceptions still attend it.’ ‘For instance, there was an impression that Muslims were expected to return a caste and in general the idea of the three categories as *alternatives meant for different elements in the population* has even yet not made complete penetration’ – sections categorized as ‘tribal’ thus are different from sections for whom a ‘caste’ is listed: the latter are ‘Hindus’ and the former are not!⁵

Leaders of the new, independent India were clear and determined: caste must be eliminated from official policies and institutions. At the first census conference after Independence, Sardar Patel, with his usual directness, told the delegates and census officials, ‘Formerly there used to be elaborate caste tables which were required in India partly to satisfy the theory that it was a caste-ridden country, and partly to meet the needs of administrative

measures dependent upon caste division. In the forthcoming Census this will no longer be a prominent feature,' and instead the census would focus on basic economic data.⁶

Identifying the castes

Determining that 52 per cent of our people are 'Other Backward Classes', of course, is not enough. To make its recommendations operational, the Mandal Commission had to specify which castes in each state were backward. And to do so it had to assess several things about them: from nebulous things like the extent to which they were discriminated against socially to easy-to-get things like the extent to which they were represented in services, elected bodies, etc.

It accomplished this in three leaps.

First it took as its base the lists which were in use in different states, and the replies to its questionnaire.

A rickety base if ever there was one. And that on its own telling.

The Commission recalled in its report judgments by which courts had struck down, for instance, the list in use in a state like Kerala as it was found to be 'based on obsolete and out of date data'. Courts and commissions, the Mandal Commission recorded, were compelled to recommend that new surveys be done to give substance to the lists.

Furthermore, it stated that in spite of these judgments and recommendations, eight states and Union territories 'have notified lists of Other Backward Classes *without ordering a formal inquiry into their conditions.*' These included Haryana, Himachal, Assam, Rajasthan and Orissa.

The Commission sent out its questionnaire. The response of the states indicated not just the extent of their anxiety to help the Commission but also the data they had on the basis of which they made such determinations.

'It was rather disappointing to see,' the Mandal Commission lamented, 'that hardly any state was able to give the desired information...'

'Repeated reminders,' it said, 'and contacts at personal level did not materially alter the situation.'

'Several questions in this section,' it recorded, 'pertained to the representation of Other Backward Classes in elected bodies, services, etc. A

couple of states have replied to these questions and even these replies are scrappy and inadequate.'

'Only Gujarat has furnished information regarding representation of OBCs in local bodies..., ' it recorded.

'Regarding the representation of OBCs in higher public services,' it wrote, *'only a couple of states have given some information...'*

'The above information is too sketchy and scrappy,' it said, *'for any meaningful inference which may be valid for the country as a whole. '*

'This section (entitled "Census"), ' it recorded about the next brick in the structure it was building, 'sought to collect information on various demographic aspects of Other Backward Classes, denotified tribes, advanced castes and to compare lists of Other Backward Classes prepared by Kaka Kalelkar Commission, with those notified by various state governments. *The information supplied was very inadequate.'*

It noted the vast disparities in even the *number* of castes recognized as backward by the Kalelkar Commission and by the state governments: 124 versus 95 in Andhra; 44 versus 119 in Assam; 88 versus 64 in Haryana; 27 versus 48 in Himachal; 64 versus 181 in Karnataka; 48 versus 76 in Kerala; 360 versus 196 in Maharashtra; 148 versus 111 in Orissa; 88 versus 62 in Punjab; 156 versus 1245 in Tamil Nadu; 120 versus 56 in UP.

The main reason for this, the Mandal Commission opined, was that, while the state governments 'prepared their lists on the basis of *some sort of field* survey and investigation,' the Kalelkar Commission 'had mostly borrowed the lists prepared by the Ministry of Education for the award of post-Matric Scholarship'! Even that claim about '*some sort of field* survey and investigation' in the case of the former, in fact, was an exaggeration: just a few pages earlier the Commission itself had been constrained to record, as we noted a moment ago, that among these very states, Haryana, Himachal, Assam, Orissa had notified their lists 'without ordering a formal inquiry into their conditions'.

The second reason that the Mandal Commission listed for the differences in the numbers tells the tale even better: 'Secondly,' it recorded, *'the pressure of field situation and local factors* may have also influenced the judgement of state governments in the preparation of these lists.'

To assess the position of the castes, the Commission needed data on their education levels. It sought the data from states. 'No state government, 'it

had to write, '*could furnish figures regarding the level of literacy and education amongst Other Backward Classes.*'

It needed data on the extent of employment among them as well as about the occupations on which they were dependent. '*No state government could furnish any precise information on this point,*' it recorded.

And so on.

The survey

The Commission ordered a field survey to identify the backward castes. Much is made of this survey by proponents of the Commission. But the Commission itself was very modest about its worth.

This is how it put the claim:

In the end it may be emphasized that this survey has *no pretensions to being a piece of academic research*. It has been conducted by the administrative machinery of the government and used as a *rough and ready tool* for evolving a set of simple criteria for identifying social and educational backwardness. Throughout this survey our approach has been conditioned by *practical considerations, realities of field conditions, constraints of resources and trained manpower and paucity of time*. All these factors obviously militate against the requirements of a technically sophisticated and academically satisfying operation.

And there is a further problem. The survey used eleven criteria to assess whether a caste was backward. Whether it is considered socially backward by others; whether it depends mainly on manual labour; whether at least 25 per cent females and 10 per cent males above the state's average get married at an age less than seventeen years in rural areas and at least 10 per cent females and 5 per cent males do so in urban areas; whether female participation in work is at least 25 per cent above the state average – these four were the 'social indicators'. There were three 'educational indicators': indices about attendance in schools, about dropouts from schools, and the proportion of matriculates. And four economic ones: the average value of family assets, the proportion living in *kuchcha* houses, the distance from the source of drinking water, and consumption loans taken by households.

Each caste was assessed on each criterion. And in regard to the quantifiable criteria, it was given a point if its deviation from the state's average exceeded 25 per cent.

But how were the eleven indices to be combined into a composite score? The social indicators were given a weightage of three points each; the educational indicators, two points each; and the economic ones, one point each. These were then totalled for the caste. The maximum score that a caste could pile up was twenty-two. Thus, by Mandalian logic a caste that scored eleven or more became 'Backward'!

The simple question that needed an answer – the simplest question, that I – was: how robust is the classification of a caste as 'Backward'? To what extent does it alter if some other – equally justifiable – criteria are used rather than these eleven? To what extent does it alter when the relative weights attached to the individual criteria – three each to numbers (i) to (iv), two each to numbers (v) to (vii), one each to numbers (viii) to (xi) – are altered?

Quite apart from the reliability of the data collected in the survey, and the choice of these criteria rather than some others, much would turn on the relative weights which were attached to the eleven criteria. What is the explanation the Mandal Commission gave for the 'three each for social', 'two each for educational', and 'one each for economic' formula? Two cryptic sentence – 'Economic, in addition to social and educational indicators, were considered important as they directly flowed from social and educational backwardness. This also helped to highlight the fact that socially and educationally backward classes are economically backward also.'

Two sentences which do not even address the question of robustness.

The result

On page 53 of its report, the Mandal Commission extolled the virtues of its criteria, its survey, its method of aggregation: '...Thirdly this method was found to be highly dependable in practice. For instance, as a result of its application, most of the well-known socially and educationally backward castes were identified as backward.'

But on the very next page it invoked the need to apply additional criteria:

In view of the foregoing the Commission has also applied some other tests like stigmas of low occupation, criminality, nomadism, beggary and untouchability to identify social backwardness.

Inadequate representation in public services was taken as another important test.

And by the next page it was compelled into candour:

In this context it may also be stated that in some cases, the findings based on socio-educational field survey *happened to be inconsistent with the living social reality*. For example, the social status of Kaseria, Kumbhar in Rajasthan, Badager in Tamil Nadu, etc. is known to be very low. Yet these castes scored below 11 points and, thus, qualified for ranking as forward. Such aberrations are bound to occur in any sociological survey which is based on statistical methods owing to *lopsidedness of the sample covered*. The only corrective to these aberrations is the *intimate personal knowledge of local conditions* and the use of massive public evidence produced before the Commission. The results of the field survey have been carefully scrutinized and such aberrations rectified as far as possible.

A survey. Its results improved by ‘personal knowledge gained through extensive touring of the country and receipt of voluminous public evidences...’

And by the very ‘Lists of OBCs notified by various state governments’ about the gross inadequacies of which the Commission itself, as we have seen, had so much to say!

By such magic mixing together of unknown potions in unknown quantities, came the list that has since become gospel for governments: a list of 3,743 castes. And these 3,743 castes are largely among the Hindus alone. Most of the non-Hindu ones are still to be put together, the Mandal Commission recorded.

The first thing to notice is that, contrary to what the Constitution requires, the Mandal Commission started with and ended with castes.

Recall its starting point. How did it determine that these ‘Other Backward Classes’ are 52 per cent of India’s population?

It began and ended by tabulating the *castes* in the 1931 census.

It did absolutely nothing else.

That can be seen in paragraph 12.19 on page 56 of the report.

By the next paragraph on the same page these *castes* become ‘Other Backward Classes’.

And the constitutional requirement is satisfied!

Again, when it came to identifying individual entities which should qualify for reservations, the Commission looked for *castes*.

The survey was organized around *castes*.

The ‘intimate personal knowledge’ it deployed was about *castes*.

The list of 3,743 entities that it furnished as the result of its labours is a list of *castes*, *castes*, nothing but *castes*.

The next point to bear in mind is about that ‘Survey’ the Mandal Commission said formed the basis of its lists. Professor B.K. Roy-Burman who headed the team revealed⁷ that each of the suggestions of the experts was ignored; that instead of 151 tables suggested by them being used, thirty-one were used; that the data collected were concealed from the experts; that while experts had concluded that occupation was a better criterion of backwardness, or at best a blend of occupation and caste should be used, the Commission plummeted for caste alone; that the tampering commenced precisely after a pilot survey in West Bengal showed that only two occupational group – blacksmiths and potter – could properly be regarded as ‘backward’; that the weights arrived at by the experts for the different criteria were arbitrarily dumped and another set fabricated; that the Commission inflated its estimate of the proportion backwards form of the population by imaginative triple counting; and so on.

The Commission itself recorded, as we have just seen, that the survey it conducted, by excluding the experts it now turns out, yielded results that were not adequate and that therefore the Commission modified them using its own ‘intimate personal knowledge’ – of course, its report does not disclose in how many cases and to what extent the results were thus modified.

No wonder, the results were of indeterminate worth. In a letter to the prime minister, Mr Biju Patnaik pointed to some laughable aspects of the list the Mandal Commission had furnished in the case of Orissa. Twenty-odd castes which it had listed as being ‘Other Backward Castes’ are in fact already recognized as Scheduled Castes, Mr Patnaik pointed out! The Commission lists as castes entities which are just surnames, and surnames which are used by high-caste persons too, he informed the prime minister! Some ‘castes’ it had listed are untraceable in Orissa.

The West Bengal government too said that it was not able to even trace some of the ‘castes’ the Commission had listed.

In the case of UP, Bihar, etc., the Commission had listed as ‘backward’, castes which are in fact dominant, and domineering.

Justices Kuldeep Singh and Sahai on Mandal's list

For reasons such as these, in *Indra Sawhney*, both Justice Kuldeep Singh and Justice R.M. Sahai roundly condemned the lists that the Mandal Commission had prepared – lists that form the basis of the castes that are today termed as ‘backward’ and which have accordingly been given access to reservations.

To begin with, Justice Kuldeep Singh pointed out, the Commission was required by its Terms of Reference, ‘to examine the desirability or otherwise of making provision for the reservations of appointments or tests... in public services.’ ‘This most vital part of the Terms of Reference was wholly ignored by the Commission,’ Justice Kuldeep Singh observed. ‘Before making its recommendations the Commission was bound, by the Terms of Reference, to determine the desirability or otherwise of such reservations. The Commission did not at all investigate this essential part of the Terms of Reference.’ The result is that discourse continued the way it had been – that is, without the aid of empirical data, a ‘discourse’ in which opposite sides continued to assert their respective positions almost as non-arguable religious positions!

Worse, Justice Kuldeep Singh pointed out, the Mandal Commission did no work to establish either the ‘backwardness’ or the inadequate representation of the 3,743 castes it proclaimed to be backward and thereby entitled to reservations. “The so-called ‘socio-educational field survey’,’ the judge found on inquiry, ‘was an eye-wash.’ Only two villages and one urban block in each district of the country were taken into consideration, he wrote. Only 0.06 per cent of the villages in the country were surveyed. What was done was just ‘clerical’, the judge established. A large number of castes were picked up without inquiry from the state list – a procedure that was ‘wholly illegal’, the judge held. Many were picked up from the report of the very commission that the Mandal Commission itself condemned – the First Backward Classes Commission headed by Kakasaheb Kalelkar. Reviewing the list of castes and the fact that it had been pasted together from diverse sources without inquiry, Justice Kuldeep Singh wrote, ‘A collection of so-called backward castes by a clerical-act based on drawing room investigation cannot be the backward classes envisaged under Article 16(4),’ and warned, ‘If the castes enlisted by Mandal are permitted to avail

the benefit of job-reservations, thereby depriving half the country's population of its right [to equality] under Article 16(1), the result would be nothing but a fraud on the Constitution' – the precise fraud that has in fact been heaped upon it since.

The worst of it was that, as Justice Kuldeep Singh noted, "The Mandal Report virtually re-writes Article 16(4) by substituting caste for class.' Caste had been made the 'sole and exclusive test' for determining which group was backward and which was not. 'Every other test – economic or non-economic – has been wholly rejected,' the judge was constrained to remark. Coming to the fabled 'indicators' that the Mandal Commission's much-vaunted 'Survey' is said to have used, Justice Kuldeep Singh stressed that these too had been applied to castes alone. 'The obsession' of the Commission with casteism is such, he wrote, that 'The Mandal Report invents castes even for non-Hindus.' As a result, the entire approach of the Commission 'was anti-secular and against the Basic Features of the Constitution,' he concluded.

Turning to the figures at which the Commission had arrived, in particular its estimate that backwards constitute 52 per cent of the population of the country, the judge wrote, 'To say the least, the exercise to reach the figure of 52% is wholly imaginary. It is in the realm of conjecture.' He drew attention to the fact that the last set of caste-wise figures that had been published was from the 1931 census, and he drew attention to the farcical extrapolations from these figures that the Mandal Commission had made, remarking, 'It is difficult to imagine how anybody can accept such illusory and wholly arbitrary calculations.' He was constrained to characterize the Commission's assumption that the relative rates of growth of different castes had remained unchanged since 1931 as 'absurd'. For one thing, he pointed out, in 1931 'India' comprised of Pakistan, Sri Lanka, Bangladesh, Burma also! How could it be that these vast territories had been hived away, that communities had fared variously in economic and social affairs, and yet their relative rates of growth that prevailed in the 1920s were the ones that prevailed fifty years later?, the judge inquired.

Furthermore, such information as was available to the Mandal Commission, on the Commission's own showing, was 'woefully inadequate'. 'Essential data was non-existent,' Justice Kuldeep Singh

observed citing what the Commission itself had recorded: In paragraph 9.4, the Commission had stated, 'Hardly any state was able to give the desired information;' as for the extent to which the backward castes were already in services of the government, the information received by the Commission was, it recorded in paragraph 9.14, 'too sketchy and scrappy for any meaningful inference which may be valid for the country as a whole'; similarly, in paragraph 9.30, it informed government, 'No state government could furnish figures regarding the level of literacy and education amongst the backward class;' as for the lists it was stitching up, the Commission, in paragraph 9.47, acknowledged, 'No list of OBCs is maintained by the Central Government, nor their particulars are separately compiled in Government offices.' The judge, therefore, held, inter alia, 'The identification of 3,743 castes as a "backward class" by the Mandal Commission is constitutionally invalid and cannot be acted upon.'⁸

Justice R.M. Sahai was equally categorical in rejecting the identifications and estimates of the Mandal Commission. He pointed out that on its own showing, the Commission had proceeded to collect and organize such data as it had deployed along caste lines. He reproduced the Commission's own account of the 'criteria' on which it had collected information during its so-called 'Survey':

A: Social

- (i) Castes/Classes considered as socially backward by others,
- (ii) *Castes/Classes* which mainly depend on manual labour...
- (iii) *Castes/Classes* where at least 25% females...
- (iv) Castes/Classes where participation by females...

B: Educational

- (v) *Castes/Classes* where the number of children...
- (vi) *Castes/Classes* where the rate of student drop-out...
- (vii) Castes/Classes among whom the proportion of matriculates...

C: Economic

- (viii) *Castes/Classes* where the average value of family assets...

- (ix) *Castes/Classes* where the number of families living in *kuchcha* houses...
- (x) *Castes/Classes* where the source of drinking water....
- (xi) *Castes/Classes* where the number of households having taken consumption loan...

And it was evident to the dullest observer that the inclusion of ‘classes’ in the listing was just the formal genuflection to accord with the terminology required by the Constitution.

The Commission had gone on to record:

... All these 11 indicators were applied to all the *castes* covered by the survey for a particular state. As a result of this application, all *castes* which had a score of... were listed as socially and educationally backward and the rest were treated as ‘advanced’...

And in paragraph 12.2, the Commission while summing up this enumeration had stated:

As the unit of identification in the above survey is *caste*, and caste is a peculiar feature of Hindu society only...

‘Caste was thus adopted as the sole criteria [sic] for determining social and educational backwardness of Hindus,’ Justice Sahai concluded, even as the Commission had come down on the Kalelkar Commission for having adopted caste as the criterion!

And the method of converted residuals, so to say, adopted for non-Hindus only confirmed the unconstitutionality that the Commission had committed: those who have converted to other religions from castes which have been included as backward castes shall be the backwards of other religions, the Commission decided in para 12.8 of its report! After showing in detail how the Constitution prohibited basing this sort of classification on caste, a matter to which we shall revert, Justice Sahai noted, ‘The constitutional constraint in such identification does not undergo any change because different groups or collectivities identified on caste are huddled together and described as backward class. By grouping together, the cluster of castes does not lose its basic characteristic and continues to be caste.’⁹

And since then

Differences between the then prime minister, V.P. Singh, and his deputy prime minister, Devi Lal, had boiled into open hostility. Caught in a forgery that we at *The Indian Express* nailed, Devi Lal had to quit. He announced that he would hold a rally in Delhi's Vijay Chowk. V.P. Singh lost his nerve. To pre-empt that rally, he lunged for Mandal. Agitations erupted across the country.

Has the situation changed in the intervening ten years? Is the list in use in your state based on some systematic survey, I asked my colleagues at *The Indian Express*. They contacted the authorities. Here are the answers they received.

Andhra: No survey 'in the strict sense' has been conducted; castes have been identified on the basis of the report submitted by a committee headed by K.N. Anantaraman in June 1970.

Assam: Mandal's list has been adopted plus the results of 'some sort of rough survey'; in this survey 'geographical remoteness, food habits, living patterns, economic standards and educational status' were used as criteria 'but they were followed very loosely.'

Bihar: Castes have been added to the list periodically; my colleague was told that, apart from other things, the government had used results of the work of two research institutions in the state.

Goa: A survey was the basis of identifying Scheduled Castes; no survey was undertaken for identifying Other Backward Castes, instead castes were recognized as backward 'on the basis of projections made by OBC leaders'.

Gujarat: A mixture of 'claims and suggestions' and the results of a survey conducted by the Bakshi Commission in 1972 – 76 have been used.

Haryana: No survey was ever carried out to determine who constitute the OBCs, nor were there any definite criteria or guidelines to determine backwardness; officers affirmed that castes are recognized as backward 'on the suggestions or recommendations of politicians and leaders'.

Jammu and Kashmir: Surveys were said to have been done; in the troubled conditions at the time, it was not possible to verify their worth.

Karnataka: It is one state in which a comprehensive survey was said to have been done; but see below for what happened to major entries in it.

Kerala: The list was prepared by the Nettoor Commission years ago; it was not based on any comprehensive survey; 'information provided by heads of departments and institutions was used... a few random sample surveys in villages and towns were used... scanty police records and newspaper reports of untouchability served to determine historically backward classes...', reported my colleague.

Madhya Pradesh: No organized survey was undertaken; guidelines for identification of a caste as backward were also vague; educational and social criteria were said to have been used 'which the present set of bureaucrats is not able to elaborate.'

Maharashtra: No comprehensive survey; list in use originated primarily from the recommendations of a committee headed by an MLA which submitted its report in November 1961.

Orissa: As the chief minister stated, the state had no list of OBCs at all.

Punjab: Periodic surveys of indeterminate substance and comparability were said to be the basis.

Rajasthan: No survey had been made to identify OBCs, and the concerned departments of the state government did not have any list of OBCs from which to operate.

West Bengal: The state government did not seem to have any information about identifying OBCs.

Tamil Nadu: From British times, castes had been periodically recognized as backward on the basis of petitions and departmental assessments; no surveys were done; the fate of the Enumeration Commission which was set up in January 1988 is noted below.

Uttar Pradesh: No survey; instead recommendations of the Chedilal Sathi Committee, which reported in 1975, and, of all things, the Mandal Commission, seem to have been the main sources for the list.

Thus, apart from Karnataka and two or three other states, there was hardly a survey to speak of. Instead, ad hoc additions; a diverse collection of criteria, varying from committee to committee, from state to state, and these combined with varying in most cases unknown, weightages.

The real determinant

And supervening over all these, the real determinant – muscle power.

The Havanur Commission removed Lingayats from the list of Backward Classes in Karnataka. The Venkataswamy Commission removed the Vokkaligas too. Violence followed. The government restored both to the list.

In September 1987, the Vanniyar Sangham in Tamil Nadu claimed that sixty-five lakh Vanniyars in the state constituted a fifth of the state's population and therefore deserved an exclusive reservation of 20 per cent. It launched a violent agitation. That triggered off a fresh wave of demands from other caste-based organizations. During his last days, MGR held discussions, more accurately these were held on his behalf with about 100 of them. The process of examining their demands came to naught as the population figures projected by each of them, when added up, far exceeded the total population of the state!

In January 1988, the state came under President's Rule. After discussions with the Vanniyar Sangham, both at the Central and state level, the Tamil Nadu government accepted in principle the need for exclusive reservations for the Most Backward Castes, including the Vanniyars, as distinct from Backward Castes in general. An Enumeration Commission headed by P.V. Venkatakrishnan was set up to conduct a census of the Most Backward Castes including the Vanniyars. The latter were not assuaged and demanded an interim reservation for themselves. Karunanidhi came to power in 1989, and announced in the Assembly that he had wound up the Enumeration Commission so as to decide the issue at the earliest – the Vanniyars having given him an 'ultimatum' in this regard. On 11 March 1989, he announced 20 per cent reservation for the Most Backward Castes, including the Vanniyars. Karunanidhi's caste was naturally among the Most Backward Castes.

This is the manner in which additions to the list, indeed reservations themselves, have been wrested.

Such was the basis of the Mandal Commission's list.

Such, that of the state lists.

Only two things have been certain: whichever caste has got organized, whichever has gained clout, has got itself anointed 'backward'; second, the number thus anointed has continued to swell. Dr P. Radhakrishnan, fellow of the Madras Institute of Development Studies, records that the list of Backward Castes in Tamil Nadu grew from 11 in 1883 to 39 in 1893 to 46

in 1903 to 122 in 1913 to 131 in 1923 to 182 in 1933 to 238 in 1943 to 270 in 1953. The Mandal Commission listed 288 for that state, a state from the government service of which, and from several professions in it, those not fortunate enough to be Backward have been well-nigh driven out.

Here is a country that is progressing, rapidly so if we go by the proclamations of successive governments. But more and more communities keep becoming Backward!

Marc Galanter sets out another typical sequence in his *Competing Equalities*. The government appointed a committee in June 1965 under the law secretary, B.N. Lakur, to review the list of Scheduled Castes and Tribes who are entitled to reservations, etc. It listed fourteen tribes and twenty-eight Scheduled Castes which, the evidence it had received, led it to believe had since their inclusion become 'relatively forward'.

A storm ensued.

Ostensibly to give effect to Lakur's recommendation, on 17 August 1967, the government introduced a bill to amend the lists. It did not leave out any of the tribes or castes which Lokur's evidence suggested had become 'relatively forward'!

The bill was referred to a Joint Parliamentary Committee. The Committee reported in November 1969. Among other changes it suggested an exclusion – that those who had converted to Christianity or Islam should no longer be taken to qualify for reservations.

Another storm ensued.

The bill that was eventually passed – during the Emergency in August 1976 – had many things, but no exclusion!

The fate of every attempt to introduce a means test – a meaningful means test that is, not a farcical one like 'OBCs who do not pay income tax' which for one thing leaves out every OBC rich farmer in the country – has been the same: it has got nowhere.

But who could not have foreseen the sequence? Who did not foresee it? We need go no farther than the Mandal Commission itself.

On Mandal's word

The Mandal Commission itself shows that castes have gone on being added to lists of OBCs not because successive surveys have chanced upon castes

whose backwardness was hitherto unknown. New castes have had to be included because they have acquired power and clout.

The Commission's report talks of the power their growing prosperity and their growing organization have been giving them. The report itself alludes to how they sit over and exploit the poor Harijans, how they are better able to take advantage of the new facilities which become available.

The Mandal Commission lists 168 castes as 'backward' in Bihar. Among these are Kurmi, Koeri and Yadava. This is on pages 178 and 179 of Volume VI of its report. But on page 34 of Volume I of that very report it says of those very castes:

The abolition of all intermediaries has definitely helped the hard working peasant castes like Kurmis, Koeries and Yadavas. These small peasant proprietors 'work very hard on their lands and also drive their labourers hard' and any resistance by the agricultural laborers gives rise to mutual conflicts and atrocities on *Harijans*...

'The Kurmi, Koeri and Yadava peasant proprietors have been in a better position to take advantage of these factors (like new agricultural inputs, rising agricultural prices etc.),' says the study commissioned by the Mandal Commission and included by it in Volume IV of its report. And, it adds, *'If the agricultural labourers show restiveness or political resistance, they do not hesitate to commit atrocities on them. This factor is at the root of the reprisals on the Harijans at Belchi, Pathada, Gopalpur, Bishrampur, Parasbigha, etc.'* As a consequence, it says, '... there is no love lost between the peasant backward castes, on the one hand, and the Scheduled Castes and Tribes on the other.'

At pages 211 – 12 of Volume VI of its report, the Mandal Commission anoints 116 castes as 'backward' in Uttar Pradesh. Among these are Gujar, Koeri, Kurmi, Lodh and Yadava. But on page 35 of Volume I of the same report, the Commission itself has this to say about these very castes:

Land reforms produced similar changes in the political economy of Uttar Pradesh as in Bihar. The tenant and share-cropping castes of Yadavas, Kurmi, Lodhs, Gujars, Koeries became owner cultivators, and industrious as they are, they are better qualified to take advantage of the modern agricultural inputs.

The study which the Commission reproduces in Volume IV of the report adds, 'Unlike the "umbrella farmers" of the forward castes, they are autonomous in their agricultural operations. *Like their counterparts in Bihar, they drive their agricultural labourers very hard. While striving to socially catch up with the forwards, they resent the rising political consciousness among the agricultural labourers.*'

But anointed 'backward' by the Mandal Commission, these very castes today enjoy reservations, separate financial institutions, exclusive and centrally funded development programmes.

'One Shri L.R. Naik from the Scheduled Castes'

'The Commission,' wrote Mandal in his letter forwarding the report to the president, *'consisted of members from Other Backward Classes and one Shri L.R. Naik from the Scheduled Castes.* ' And the Commission, according to its report, operated on the following rule:

During the visits of the Commission or any sub-committee appointed by them to any State and during any sitting held by the Commission or the sub-committee in any State, the Commission may co-opt two persons, who belong to the State and *who are members of backward classes*, to be additional members of the Commission or the sub-committee, as the case may be.

A Commission to determine benefits to the 'Other Backward Classes' all of whose members, save one, are from the 'Other Backward Classes', all of whose additional members are from the 'Other Backward Classes'.

A packed bench?

But I am on that 'one Shri L.R. Naik'. It turns out that this gentleman submitted a note of dissent to the report!

As we have seen, in Panditji's time, the Central government itself was pointing to the danger that as the weaker castes had powerful elements, these elements would gobble up the benefits. The Mandal Commission itself recalled the Memorandum of Action Taken on the First Backward Classes Commission that the Central government tabled in Parliament, and recorded:

Regarding the recognition of a large number of castes and communities as backward, it was pointed out, 'If the entire community, barring a few exceptions, has thus to be regarded as backward, the really needy would be swamped by the multitude and hardly receive any special

attention or adequate assistance, nor would such dispensation fulfill the conditions laid down in Article 340 of the Constitution.'

And this is precisely the point which the member whom the Mandal Commission referred to as 'one Shri L.R. Naik from the Scheduled Castes' made in his note of dissent. He recorded plaintively:

I hold very sincerely that castes/classes mentioned in the common list each having homogenous and cohesive characteristics, are not at the same degree or level of social and educational backwardness and I fear that the safeguards recommended for their advancement will not percolate to less unfortunate (sic.) sections among them and the constitutional objectives proclaiming an establishment of an egalitarian society will remain a myth.

He, therefore, partitioned the Mandal Commission's list of 'Backward Classes' into two: one list of 'Intermediate Backward Classes' and one of 'Depressed Backward Classes'.

He said:

During the course of my extensive tours throughout the length and breadth of India, I observed that a tendency is fast developing among 'Intermediate Backward Classes' to repeat the treatments or rather ill-treatments, they themselves have received from times immemorial at the hands of the upper castes, against their brethren. I mean, 'the Depressed Backward Classes'. In an unequal society like ours, it is necessary that the Commission take all precautions so that the more helpless and needy segments are not deprived of the benefits of the various safeguards by avoiding cut-throat competition among unequals. The casteism is still very much in our midst and this is assuming new forms without showing much loss of its original vitality. In fact, several observers feel that the logic of democratic politics and mass mobilisation has brought casteism to the center of the stage. It is with regret, I affirm that political leaders belonging to 'Intermediate Backward Classes' are not immune from such aberration nor they are imaginative enough to bring about the advancement of the people who are at the bottom of our society, such as these 'Depressed Backward Classes'. All that they seem to be doing is to emulate some disgruntled upper castes in usurping economic and political power in the name of backward classes. This is a mental aberration which deserves outright condemnation from whatever quarters it may emanate – whether from Upper Castes or Intermediate Backward Classes.

Do these castes fit the description?

Justice R.M. Sahai drew pointed attention to this danger in *Indra Sawhney*. He pointed to the preliminary difficulty. Different castes were recognized as backward in different states. Often this is so for good reason: many of them are 'backward' in one state and not so in another state. Aggregating them

for purposes of reservations in all-India services would foment ‘confusion’, he said. Furthermore, it would ‘encourage paper mobility’ with candidates and employees moving from states where their caste is not anointed backward to states in which it *is* recognized as backward. Most important, he drew attention to the way the lists of backwards are getting to be drawn up, and pointed out that going by those lists may in fact ‘suffer from a constitutional infirmity.’ ‘Many groups or collectivities in different states are continuing or have been included in the state list on various considerations political or otherwise,’ he wrote, and gave the example of what had been happening in Karnataka. ‘Commission after commission beginning from Gowda Commission, Venkataswamy Commission and Havanur Commission despite having found that some of the castes ceased to be backward they continue in the list due to their political pressure and economic power.’ He cited the findings of Ghanshyam Shah. In his *Social Backwardness and Politics of Reservations*, Shah has pointed out, ‘Among the *Sudras* there are peasant castes, artisan castes and nomadic castes. Subjective perception of one’s position in the “*varna*” system varies and changes from time to time, place to place and context to context. For instance, the Patidars of Gujarat were considered *Sudras* a few decades ago, but now they call themselves Vaishyas, and are acknowledged as such by others. It is significant that they are not have-nots. Similar is the case of Vokkaligas and Lingayats of Karnataka, Reddies and Kammas of Andhra Pradesh, Marathas of Maharashtra and to some extent Yadavas of Bihar.’

‘Yet these castes or groups have been identified as backward class in their State,’ Justice Sahai noted.¹⁰

Do these castes fit the description that judges of the Supreme Court give of sections on account of whose condition reservations are justified? ‘The frail and emaciated section of the people living in poverty, rearing in obscurity, possessing no wealth or influence, having no education, much less higher education and suffering from social repression and oppression...,’ we read. ‘Living below the poverty line and suffering from social ostracism...’ ‘The undignified social status and sub-human living conditions... their forlorn hopes...,’ the ‘appalling situation and the pathetic condition of the backward classes...’ Their ‘low birth’, their ‘demeaning occupation’, their ‘degeneration and deprivation caused by prior and

continuing discrimination, exploitation, neglect, poverty, disease, isolation, bondage and humiliation....’ “Their roots of origin in the lowest of the low segments of society; their affiliation with what are traditionally regarded as demeaning occupations; their humiliating and inescapable segregation and chronic isolation from the rest of the population; their social and educational deprivation and helplessness; their abysmal poverty and degenerating backwardness...’ Classes of citizens that ‘are incapable of uplifting themselves in order to join the mainstream of upward mobility...’¹¹

Does any of this describe the Jats of Rajasthan? Does it describe the Vokkaligas and Lingayats of Karnataka? The Reddys and Kammas of Andhra? The Yadavs of UP and Bihar? Is any of it a description of the powerful castes which have wrested the title ‘backwards’ in Gujarat?

And yet it is from such descriptions that reservations are justified, indeed from such descriptions that their extension to groups beyond Scheduled Castes and Tribes is justified.

And how has the court come to accept all this?

How have the courts come to accept this wholesale perversion of the scheme of the Constitution? Indeed, as is evident from so many of their pronouncements, how have they come to justify the perversion?

The first problem has been gentlemanliness! The courts have all too often assumed that other limbs of the constitutional structure are responsible, that they are as committed to the Constitution, its values and mores, and that, therefore, for them a hint will be enough. Accordingly, the courts have on occasion left the obvious point unsaid, they have often seemed to have felt that an ambiguity would be sufficient. In fact, those in the executive as well as legislatures have seized each omission, each ambiguity to press their populism farther.

This can be illustrated by a host of instance – beginning from the very first cases relating to Article 15(1) and Article 16(4) that came before the Supreme Court soon after the Constitution was adopted. There were two of them. Judgments on them were delivered by the same bench, and it consisted of seven judges, on the same day. *Chamyakam Dorairajan*, as we have seen, arose because a young girl was denied admission solely because she was from a caste which was other than the castes for which reservations had been made. Her score showed that, but for the fact that she had been born to parents of one caste rather than another, she would have secured the admission. The Supreme Court struck down the government instructions under which she was denied admission on the ground that they violated Article 15(1) as well as Article 29(2).

B. Venkataramana arose because the petitioner had not secured appointment as a district munsif solely because he was a Brahmin. Under the old Communal Order, the Madras government had reserved positions

for a series of communities – Harijans, Muslims, Christians, backward Hindus, non-Brahmin Hindus, and Brahmins. It was admitted on all hands that, like that hapless girl, Venkataramana would have got the position but for the fact that he was a Brahmin. The court held that as far as the number of seats that had been reserved for Harijans and backward Hindus was concerned, no relief could be given. Article 16(4) enables the state to reserve seats for these categories. If all the vacancies get filled up by these categories, it must be deemed that Venkataramana has not been able to get in, not because he is Brahmin, or because he is of a particular religion, caste or race but because of the necessity of making reservations for the backward classes as permitted by Article 16(4). However, the reservations that had been made for the other categories – that is, categories other than ‘*Harijans*’ and ‘*Backward Hindus*’ – were manifestly not for the ‘*Backward Classes*’ permitted by Article 16(4), and, therefore, the exclusion of Venkataramana on account of seats having been filled up by candidates from these other categories was clearly the result only of his being a Brahmin; therefore, to the extent that those reservations blocked Venkataramana out of this latter category of seats, the instructions were unconstitutional.¹

The decisions were clear-cut; their effect was to strike down exclusion of persons either from educational institutions or from government employment on the basis of caste; and, in fact, as we have seen, *Champakam Dorairajan* triggered the move to add a new clause to Article 15. But there was an ambiguity. The lists which had been used in the Communal Order by the Madras government, at least in as much as they related to Hindus, were based entirely on caste. The court had not struck down these lists. This was made much of subsequently.²

But things have gone much farther than mere ambiguity – on occasion, they have resulted in a definite resolve *not* to see. Recall that the last time that a census collected data on a caste basis was in 1931. Since then no census has compiled caste-wise data. In a typical case – it was decided in 1972 – the reservations that were at issue were based on data from the 1921 census. Since 1921 the relative position of caste – their shares in the state’s population, the social, educational, economic position – would have been affected by differential rates of growth, by migration, by the differential

fortunes of different occupations. But 1921 it was! A sort of survey was conducted by the commission that had been set up to assess the backwardness of different castes. The Supreme Court itself noted that only 50 per cent of the schools contacted responded to the questionnaire that the commission sent out. Yet the court just waived the matter aside: 'if only 50 per cent of the institutions sent replies, it is not the fault of the Commission for they could not get more particulars,' it declared.³ The question was not, 'Whose fault is it?' The question was, 'Are the data that have been used reliable?' But, "The moving finger writes, and having writ..."

Confronted with the fact that the list that was being advanced for reservations was based entirely on castes, the Supreme Court took comfort by maintaining, 'though *prima facie* the list of Backward Classes which is under attack before us may be considered to be on the basis of caste, a closer examination will clearly show that it is only a description of the group following the particular occupations or professions...' ⁴ If that was indeed the case, why not refer directly and only to the occupations and professions? After all, the court has itself so often stressed that there is a fundamental difference between caste and occupation: namely, that, on the court's reckoning, one can change one's occupation but never change one's caste.

Next, in its refusal to strike down the list that was patently nothing but a list of castes, the Supreme Court held that from what the concerned commission had set out 'the entire caste is socially and educationally backward and, therefore, their inclusion in the list of Backward Classes is warranted by Article 15(4).' We need not revisit the adequacy of the data, nor the criteria that the particular commission had used. The question that arises is why the court has not applied the test to Vokkaligas, Lingayats, Yadavs, Jats..., the very castes which commissions have pointed out are not backward ones, which in fact they have recorded are the ones that oppress the downtrodden in the countryside?

And that waiving away an inconvenience, as we shall see, is typical.

Have earlier judgments held that only those classes of citizens whose average is 'well below the state average' can be treated as educationally backward and reservations extended to them? Is it the case in the instance at hand that castes have been included which scored *higher* than the state

average on the indices which the court itself finds appropriate in this very case? No matter. In the earlier judgment, says the Supreme Court, the court ‘does not propose to lay down any hard and fast rule,’ that it ‘has only indicated the broad principles to be kept in view when making the provision under Article 15(4)...’ Did the high court hold that the commission which had been set up to identify backward castes had ‘adopted an ingenious method’ to overcome the fact that these castes had scored more than the state average on the criteria that the commission itself had selected? And that, therefore, the commission had supplemented the results by ‘personal knowledge’ and visits and pronounced them backward nonetheless? No matter: this ‘personal knowledge’ and the visits showed that the living conditions of these castes were ‘deplorably poor’; therefore, the fact that ‘the information received from the various schools showed that the percentage of education was slightly higher than the state average’ ‘should not operate to their disadvantage.’⁵

The Constitution says that no one can be discriminated against only on grounds of caste. Is it the case that, by reserving seats for members of these castes, other – who had actually scored higher than these candidates in the common entrance test – have been excluded only on the ground that they do not belong to these castes? No problem. In a typical passage of the kind that we shall encounter often, the court, confronted with the fact that the list of groups to whom reservation has been extended is based solely on caste, declares, ‘It is true that in the present cases the list of socially and educationally backward classes has been specified by caste. But that does not *necessarily* mean that caste was the sole consideration and that persons belonging to these castes are also not a class of socially and educationally backward citizens....’⁶

Minor P. Rajendran congealed another change, at the least the drift of the judgment enabled activist judges to read a change of great consequence: the court was later to draw the conclusion that the burden of proof would henceforth lie on the one who challenged a list approved by government – that *he* must prove that the class/ caste as a whole is not backward.⁷

The word ‘only’

Underlying that ruling is the typical and foremost dodge. In the articles that forbid discrimination – Articles 15(1) and (2) and 16(1) and (2) – the judges record, the Constitution says that no one shall be discriminated against ‘only’ on grounds of, to stick to our present concern, caste. Hence, if caste is just *one of the factors* that went into determining that a caste is backward; if, for instance, in addition to their caste, the occupation of its members, their educational standing, the religious and social practices of the caste too have been taken into account, then the reservation that is being made for them, and the ground on which others are being excluded from those seats or posts is not ‘only caste’. Hence, the reservation is constitutional.

That such constructions are strained should be evident *ex facie*. Turn the matter around. Assume that the discrimination in question is based on *both* caste and religion. It would then not be based *only* on caste. Would it for that reason be immune to challenge in view of the ‘only’ in Articles 15, 16 and 29?

The legislative history of the word puts the matter beyond doubt.

The word ‘only’ was not in the original draft. Sir B.N. Rau took it over from Section 298(1) of the Government of India Act, 1935, and, in view of discussions in the Assembly and in the Committee on Minorities, inserted it. Given the use to which the word has since been put to justify caste-based reservations, the illustration he gave to explain the reason for introducing the word is indeed instructive. Consider citizens from South Africa, he explained. It may be that the Indian government may want to put restrictions on them in retaliation for South Africa’s policy of apartheid. In the absence of ‘only’ in the article, someone could object saying that he was being discriminated against on the ground of race. But if ‘only’ is inserted, the person cannot object: the discrimination shall not be *only* on ground of his race – the apartheid policy of South Africa would have been another factor that would have gone into the decision.⁸ Moreover, the word would clarify that discrimination on grounds that are not excluded by Articles 15(2) and 16(2) respectively shall be permissible: as Basu notes with reference to relevant cases in his *Commentary*, an innkeeper may refuse accommodation on the ground, for instance, that the person is intoxicated or that he has an infectious or contagious disease or that he is immoral, etc.⁹

In *Indra Sawhney*, Justice R.M. Sahai turns to this cover of progressives, and in the process makes an important distinction which sets out the dual function of the word. Is it permissible under the Constitution to discriminate on the basis of caste as long as the discrimination is also based on a few other grounds?, the judge asks. Is that what the Constitution-makers had in mind?

Justice Sahai explains the dual function of the word ‘only’ in Article 16(2). It is permissive when the state action is founded on grounds other than race, religion or caste; and prohibitive when that action is founded on the grounds mentioned by it, he says. And he gives two telling illustrations from settled cases. Candidates sitting for the IAS examination had to take a compulsory language paper. A notification exempted candidates from some of the northeastern states. The notification was challenged. The court upheld it as a linguistic concession. ‘When it comes to any State action on race, religion or caste etc. the word, “only” mitigates the constitutional prohibition,’ Justice Sahai explains. ‘That is, if the action is not founded, exclusively, or merely, on that which is prohibited then it may not be susceptible to challenge.’

Does that mean that the state can take a step based on religion, caste, etc., dress it up with some other considerations and criteria, ‘with any factor relevant or irrelevant,’ and be confident that the measure cannot be challenged? Justice Sahai recalls the decision in *State of Rajasthan v. Thakur Pratap Singh*. Additional police had to be stationed in an area because of disturbances. To bring the gravity home to the people, the government directed that they shall pay for the additional police force. Harijans and Muslims, however, were exempted from paying the levy on the ground that persons from these communities had not been guilty of the conduct which had made it necessary to station the additional police in the area. The court struck down the order. The government has not been able to show that there are no law-abiding persons in other communities. As they have not been exempted, the exempting of Harijans and Muslims has been done ‘only’ on ground of caste and religion, the court held.

Accordingly, the judge warned, ‘Today if Article 16(2) is construed as justifying identification of backward class by equalizing them with those castes in which the customary marriage age is lower or majority of whom are living in *kutcha* houses or a sizeable number is working as manual

labour, then tomorrow the identification of backward class amongst other communities where caste does not exist on grounds of race or religion coupled with these very considerations cannot be avoided. That would result in making reservation in public services on communal considerations. An interpretation or construction resulting in such catastrophic consequences must be avoided.’¹⁰

But what several progressive judges have done has legitimized the dressing up. From ‘No discrimination on grounds of caste’; to ‘No discrimination only on grounds of caste’; to ‘Although this discrimination is based undeniably on caste, it is valid because factors other than caste too have been taken into account’; to ‘This discrimination is valid because the fact that the list is only in terms of castes does not *necessarily* imply that other factors have not been taken into account’; to the situation now when, elections in view, a manifestly dominant, powerful caste with money as well as muscle, a caste that owns land, a caste that is wedded to practices that are far removed from those associated with the socially backward castes – Jats, say, or Bishnois in Rajasthan, in Madhya Pradesh – is anointed ‘backward’ and conferred entitlement to reservations, no one even bothers to take the matter to courts.

A warning ignored

Justice H.R. Khanna had warned against this very prospect – namely, that the aperture that the court was providing would only clear the way for governments to decree reservations to castes they wanted to oblige, and then, so as not to fall foul of the courts and the Constitution, dress up the decision by throwing in a few other indices. Faced, on the one side, with the decision of a government that had once again extended the time by which members of particular castes may acquire even minimum proficiency, and, on the other, with progressive judges who were finding all sorts of arguments for justifying caste-based decisions, Justice Khanna penned a warning every word of which ought to be read to this day. He first explained that equality of opportunity is a cornerstone of the Constitution, and that it is guaranteed for *all* citizen – ‘the least deserving as well as the most virtuous’; that ‘Privileges, advantages, favours, exemptions, concessions specially earmarked for sections of population run counter to

the concept of equality of opportunity, they indeed eat into the very vitals of that concept.’ He wrote:

What clause (1) of Article 16 ensures is equality of opportunity for all citizens as individuals in matters relating to employment or appointment to any office under the State. It applies to them all, the least deserving as well as the most virtuous. Preferential and favoured treatment for some citizens in the matter of employment or appointment to any office under the State would be antithesis of the principle of equality of opportunity. Equality of opportunity in matters of employment guaranteed by clause (1) of Article 16 is intended to be real and effective. It is not something abstract or illusory. It is a command to be obeyed, not one to be defied or circumvented. It cannot be reduced to shambles under some cloak. Immunity or exemption granted to a class, however limited, must necessarily have the effect of according favoured treatment to that class and of creating discrimination against others to whom such immunity or exemption is not granted. Equality of opportunity is one of the cornerstones of our Constitution. It finds a prominent mention in the Preamble to the Constitution and is one of the pillars which gives support and strength to the social, political and administrative edifice of the nation. Privileges, advantages, favours, exemptions, concessions specially earmarked for sections of population run counter to the concept of equality of opportunity, they indeed eat into the very vitals of that concept. To countenance classification for the purpose of according preferential treatment to persons not sought to be recruited from different sources and in cases not covered by clause (4) of Article 16 would have the effect of eroding, if not destroying altogether, the valued principle of equality of opportunity enshrined in clause (1) of Article 16.¹¹

He pointed out that in every case till then the classification scheme that had been accepted by the court had been approved on the ground that the basis of differentiation related to the efficiency of administration. He recalled, for instance, the Supreme Court verdict in *Station Masters and Assistant Station Masters Association v. General Manager, Central Railway*,¹² in which, for promotion, candidates were differentiated between those who had an engineering degree and those who had merely a diploma. Similarly, in another instance the court had accepted a classification based on some candidates being direct recruits and others being promotees. Under Article 16(1), the court had not accepted classifications that sought to differentiate persons on the ground that they belonged to two sections of the population.¹³ He warned:

The proposition that to overdo classification is to undermine equality is specially true in the context of Article 16(1). To introduce fresh notions, of classification in Article 16(1), as is sought to be done in the present case, would necessarily have the effect of vesting the State under the

garb of classification with power of treating sections of population as favoured classes for public employment. *The limitation imposed by clause (2) of Article 16 may also not prove very effective because, as has been pointed out during the course of arguments, that clause prevents discrimination on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them. It may not be difficult to circumvent that clause by mentioning grounds other than those mentioned in clause (2).*

How prophetic that warning sounds today. And so he counselled that the court not condone such classification schemes, for

To expand the frontiers of classification beyond those which have so far been recognized under clause (1) of Article 16 is bound to result in creation of classes for favoured and preferential treatment for public employment and thus erode the concept of equality of opportunity for all citizens in matters relating to employment under the State.¹⁴

But these were the years – 1975, 1976 – of a ‘committed judiciary’. The warning went unheeded. Progressives had their way.

Progressives triumph

It isn’t the case, of course, that the judiciary has come to this cul-de-sac in single file. Reviewing the course of contrary decisions, Justice D.A. Desai talked of ‘the dithering and vacillation on the part of the Judiciary’ in this regard, and observed that ‘a serious doubt is now nagging the jurists, the sociologists and the administrators whether caste should be the basis of recognizing backwardness.’¹⁵ What has happened is that while every judgment has continued to repeat the formula words that would satisfy the bare provisions of the Constitution, the scale has been given a tilt that doesn’t just condone, it legitimizes caste-mongering.

In the original case, *State of Madras v. Champakam Dorairajan*, which triggered a clause in the first amendment to the Constitution, the Supreme Court struck down the government’s order on the ground that it was based on caste, religion or race – each and every one of them prohibited by the Constitution. The persons who had been denied admission had been denied it not because they did not have the academic qualifications for it but simply because they were not of a set of castes. This violates fundamental rights of the persons, the court held, and these are ‘sacrosanct and not liable

to be abridged by any Legislative or Executive act or order, except to the extent provided in the appropriate Article in Part III.’¹⁶

In *M.R. Balaji v. State of Mysore*, the Supreme Court emphasized that social backwardness in the ultimate analysis is the result of poverty, that ‘The classes of citizens who are deplorably poor automatically become socially backward;’ that certain occupations too may contribute to making persons following them socially backward; that, therefore, economic backwardness and criteria such as occupation and habitation are much more reliable criteria for determining backwardness. It recognized that caste could be a relevant factor, but stressed that under no circumstances must it be made the sole or even the dominant test. The court gave additional reasons for shunning caste as the sole or dominant criterion. Doing so, it said, ‘may not always be logical and may perhaps contain the vice of perpetuating the castes themselves’. Moreover, there are groups in religions that have forsworn caste – like Islam and Christianity – which may be as deserving of help as the specified castes among Hindus.¹⁷

The matter was put to the test again in *Chitralkha*. Justice Subba Rao put the criteria beyond doubt. He recalled what Justice Gajendragadkar had written in *M.R. Balaji*, and the reasons, other than the fundamental one of the explicit provisions of the Constitution, that had been spelt out in that case. Justice Subba Rao said that while caste may be ‘a relevant circumstance’ for ascertaining backwardness in certain instances, if an authority could identify backwardness without reference to caste that identification would be valid.

In addition to the reasons that had been given in *M.R. Balaji*, Justice Subba Rao pointed out two factors on account of which also caste ought not to be used as the sole or dominant criterion. He recalled that these provisions had been made in the Constitution to lift the educationally and socially backward in our society ‘but not to give weightage to progressive sections of our society under the false colour of caste to which they happen to belong’. Article 15(4) speaks of ‘classes’ not ‘castes’, he pointed out. ‘If the makers of the Constitution intended to take castes also as units of social and educational backwardness, they would have said so as they have said in the case of the Scheduled Castes and the Scheduled Tribes,’ he declared. ‘Though it may be suggested that the wider expression “classes” is used in

clause (4) of Article 15 as there are communities without castes, if the intention was to equate classes with castes, nothing prevented the makers of the Constitution to use the expression “Backward classes or castes”. The juxtaposition of the expression “Backward Classes” and “Scheduled Castes” in Article 15(4) leads to a reasonable inference that the expression “classes” is not synonymous with castes.’

It is only this interpretation that would avoid the anomaly that would arise if the two expressions are equated, he stressed. ‘It [keeping to the expression used in the Constitution, “classes”, and keeping it apart from “castes”] helps the really Backward Classes instead of promoting the interests of individuals or groups who, [though] they belong to a particular caste a majority whereof is socially and educationally backward, really belong to a class which is socially and educationally advanced.’ ‘To illustrate,’ he continued, ‘take a caste in a state which is numerically the largest therein. It may be that though a majority of the people in that caste are socially and educationally backward, an effective minority may be socially and educationally far more advanced than another small sub-caste the total number of which is far less than the said minority. If we interpret the expression “classes” as “castes”, the object of the Constitution will be frustrated and the people who do not deserve any adventitious aid may get it to the exclusion of those who really deserve.’

Hence, he concluded, while caste may be taken into account ‘under no circumstance a “class” can be equated to a “caste”....’ ‘We would also make it clear,’ he added for good measure, ‘that if in a given situation caste is excluded in ascertaining backwardness within the meaning of Article 15(4) of the Constitution, it does not vitiate the classification if it satisfies other tests.’¹⁸

The Government of Jammu and Kashmir decreed that half the gazetted posts that were to be filled by promotion would be reserved for Muslims. The order came to the Supreme Court. The argument that was advanced was that Muslims were under-represented in the services of the state, and, as mandated by Article 16(4), the government had the authority to, indeed was in duty bound to reserve posts for them to make sure that they were adequately represented. In *Triloki Nath*, the Supreme Court stated decisively that the expression ‘backward classes’ is not synonymous with

‘backward castes’ or ‘backward communities’. It struck down the rationalization that the Government of J&K had advanced, and reaffirmed that any classification based solely or predominantly on caste, community, race, religion, descent, place of birth, etc., flew in the face of specific provisions of the Constitution. ‘Caste as a basis for determining backwardness received a rude jolt,’ Justice D.A Desai noted.

In *Periakaruppan*, the Supreme Court was faced with an instance in which students who had admittedly had ‘brilliant’ records were denied admission as seats were reserved for members of some castes. The court made three important point – one of which was to survive in subsequent rhetoric; one was forgotten completely; and one was to be cited for its operational implication, as it was a handy observation for caste-based reservations.

The court first pointed to the fact that it was in the long-term interests of the country that backward classes also be lifted:

Undoubtedly we should not forget that it is against the immediate interest of the Nation to exclude from the portals of our Medical Colleges qualified and competent students but then the immediate advantages of the Nation have to be harmonised with its long range interests. It cannot be denied that unaided many sections of the people in this country cannot compete with the advanced sections of the Nation. Advantages secured due to historical reasons should not be considered as fundamental rights. Nation’s interest will be best served – taking a long range view – if the backward classes are helped to march forward and take their place in line with the advanced sections of the people.¹⁹

The moot question related to the criteria by which the backward classes were to be identified. Reviewing the judgment, Justice D.A. Desai observed, ‘It is difficult to make out whether the Court accepted caste as the sole basis for determining social and educational backwardness.’ That is so because, while repeating what had been held in the earlier judgments, in *A. Peeriakaruppan*, the Court also observed that ‘A caste has always been recognized as a class.’ And that in the country there are castes that are socially and educationally backward. ‘To ignore their existence is to ignore the facts of life,’ it said. These are the observations that came to be picked up from this judgment. That to ignore that to base ameliorative measures on the criterion of caste would perpetuate the very evil that the Constitution

aims to eradicate would also be to ignore the facts of life – this the court did not examine.

Even in this judgment, the court did point to a vital consideration that it said must be borne in mind while decreeing reservations. Even as it pointed out that the facts of life cannot be ignored, it emphasized:

But all the same the Government should not proceed on the basis that once a class is considered as a backward class it should continue to be backward class for all times. Such an approach would defeat the very purpose of the reservation because once a class reaches a stage of progress which some modern writers call as take off stage then competition is necessary for their future progress. The Government should always keep under review the question of reservation of seats and only the classes which are really socially and educationally backward should be allowed to have the benefit of reservation. Reservation of seats should not be allowed to become a vested interest.

And in this context it pointed to a telling empirical fact:

The fact that candidates of backward classes have secured about 50% of the seats in the general pool does show that the time has come for a *de novo* comprehensive examination of the question.

It must be remembered that the Government's decision in this regard is open to judicial review.²⁰

That was *thirty-five years* ago. Put that prescription alongside the following facts that *The Hindu* reported recently. On 23 August 2004, the paper reported that of the total 1,224 seats in twelve government medical colleges, 952, that is *77.9 per cent* have been taken by Backward Class and Most Backward Class students. They have scored so well as to capture each of the first fourteen ranks. Students from castes which did not have reservations were able to secure just 2.3 per cent of the seats. In the top 100 ranks, the non-reserved-caste candidates got just six places. The Backward Class candidates got 79 of the places, and the Most Backward Class candidates bagged 13. Of the first 400 ranks, only thirty-one were from the non-reservation castes.²¹

But who recalls that prescription today? Who dares suggest that in view of evidence of this kind, which suggests that the reservationists have overcome their handicaps, the policy of reservations should be reviewed?

In fact, such prescriptions of the court have been ignored totally. All that is cited from a case such as *A. Periakaruppan (Minor)* are those two observations – ‘A caste has always been recognized as a class,’ and ‘There is

no gainsaying the fact that there are numerous castes in the country which are socially and educationally backward. To ignore their existence is to ignore the facts of life.’

Even in *Soshit Karamchari Sangh*, the court observed:

If freedom, justice and equal opportunity to unfold one’s own personality belong alike to *bhangi* and Brahmin, prince and pauper, if the *panchama* proletariat is to feel the social transformation Article 16(4) promises, *the State must apply equalizing techniques which will enlarge their opportunities and thereby progressively diminish the need for props. The success of State action under Article 16(4) consists in the speed with which result-oriented reservation withers away as no longer a need, not in the everwidening and everlasting operation of an exception (Article 16(4)) as if it were a superfundamental right to continue backward all the time. To lend immortality to the reservation policy is to defeat its raison d’etre; to politicize this provision for communal support and Party ends is to subvert the solemn undertaking of Article 16(1); to casteify ‘reservations’ even beyond the dismal groups of backward-most people, euphemistically described as SC&ST, is to run a grave constitutional risk. Caste, ipso facto, is not class in a secular State.*²²

That was in *Soshit Karamchari Sangh*.

Twenty-five years ago.

What was to be a temporary expedient has become a permanent feature. What was to be a concession for a few has become the right of vast multitudes, a right they wrest by might. What was to be a facility made available to the extent that this could be done consistently with the efficient functioning of the State has been debased to the point that it now bears no resemblance at all to what the Constitution had intended.

The scales are tilted

But to proceed, by *U.S.V. Balram*, the scale had begun to tilt visibly. A caste is a class, the Supreme Court said. Examining the judgment and the data which the court had considered in the case, Justice Desai observed, ‘The assumption that all the members of a given caste are socially and educationally backward is wholly unfounded and lacks factual support obtained by survey.’ He could have put the point in stronger words for the court had held that, if the caste as a whole is backward, notwithstanding the fact that some members of it are both socially and educationally advanced, to characterize it as backward is valid. Indeed, the data before the court

showed clearly that some sections of the caste that had been characterized as backward were placed even higher than the state average. The court had brushed that fact aside: ‘No doubt there are [a] few instances where the educational average is slightly above the State average, but that circumstance by itself is not enough to strike down the entire list. In fact, even there it is seen that when the whole class in which that particular group is included, is considered, the average works out to be less than the State average. Even assuming there are [a] few categories which are [a] little above the State average, in literacy, that is a matter for the State to take note of and review the position of such categories of persons and take a suitable decision.’²³

Notice in passing a device here: how in some cases judges convince themselves that they have a duty to intervene, even to the extent of giving directions on administration, and how in other – as in the one we are considering – they shrug off matters that fall in the heart of the question that is before them ‘for the State to take note of... and take a suitable decision’.

The following year, the scale was tilted almost completely in the direction that the ‘caste-is-class’ school advocated. Recall that in *M.R. Balaji*, the Supreme Court had held that social and educational backwardness is ultimately due to poverty, and that, therefore, economic criteria are the best indices of backwardness. In *Janki Prasad Parimoo*, the court put the balance the other way. Mere poverty cannot be the test, it said, because in India, except for a small proportion, the people are all poor. To qualify for the assistance that is envisaged by the Constitution, the group must be both socially and educationally backward. Now, it is true, the court allowed that ‘In India social and educational backwardness is further associated with economic backwardness and it is observed in *Balaji* case – that backwardness, socially and educationally, is ultimately and primarily due to poverty.’ ‘But if poverty is the exclusive test,’ the court now maintained, ‘a very large proportion of the population in India would have to be regarded as socially and educationally backward, and if reservations are made only on the ground of economic considerations, an untenable situation may arise. Even in sectors which are recognized as socially and educationally advanced, there are large pockets of poverty.’ The task of an investigator is not just to identify the poor, but to go further and ascertain

who, among the poor, are also socially and educationally backward. On this reasoning the court struck down some of the groups that the committee set up for the purpose had identified as qualifying for special assistance. The reasoning by which it did so is what is important for our present concerns.

The committee had proceeded on the criterion that cultivators with holdings less than 10 *kanals* were backward. The court said this would lead to anomalies: 'If a cultivator holds 10 *kanals* of land or less he is to be regarded as backward, i.e. to say socially and educationally backward. But, if his own brother living in the same village owns half a *kanal* more than the ceiling he is not to be considered backward. This completely distorts the picture. It will be very difficult to say that if a person owns just 10 *kanals* of land, he should be considered socially and educationally backward while his brother owning half a *kanal* more should not be so considered.'

That observation is a bit odd, as it would be true of any cut-off line that anyone, including the court, would choose. The sentence that followed was even more consequential for the future – 'The error in such a case lies in placing economic consideration above considerations which go to show whether a particular class is socially and educationally backward.' That put paid to *M.R. Balaji* and similar rulings.

The committee, and following it the Government of J&K, had identified pensioners who received less than Rs 100 per month as backward. The court rejected this category too saying that in their case "The same error is repeated.' Moreover, they do not constitute a homogeneous group, it reasoned. Do read the reasoning on which the court decided that these sections do not constitute a 'class', and apply that very reasoning to the caste after caste which the same court has time and again accepted to be a 'class'. The court observed:

It is difficult to say that these pensioners are a class in the sense that they are a homogeneous group. They are an amorphous section of Government servants who by the *accident* of receiving Rs 100 or less as pay at the time of retirement or being ex-servicemen of certain grades are pushed into *an artificially created body*. It may be that they belong to Class IV or similar grade service of the State. But that is not the test of their social and educational backwardness. In days when sources of employment were few, many people though socially advanced might have accepted low paid jobs. Some of them may have failed to make the educational grade and were hence forced by necessity to accept such low paid jobs. Some others might have prematurely

retired from posts carrying the scale referred to above. The accident, therefore, that they belong to a section of Government servants of certain category is no test of their social backwardness.

With that, the court was back, via the brother, to its argument about the dividing line:

The test breaks down if the position of a brother of such a pensioner is considered. If the brother, also a Government servant, has the misfortune of retiring when holding a post the maximum of which was Rs. 105 he was liable to be regarded as not socially and educationally backward when, in all conscience, so far as the two brothers are concerned they remain on the same social level. Another brother who is privately employed and retires from service without any pensionary benefits would not be entitled to be classed as backward under the test. The anomalies arise because of the artificial nature of the group created by the Committee. If all the brothers are socially and educationally backward, you will be differentiating between them by calling some more backward and others less backward....²⁴

In other cases, from even among the ones considered in this volume, the court insists on focusing on actuals only; it forswears ‘hypotheticals’; and that focus on the facts that are before it is used as precedent in subsequent rulings. And here? Such bifocals apart, such reasoning of this kind would call in question, and that is exactly what it did, any and every economic criterion – for, adjudged by an economic criterion like income or assets or calorie intake, persons would fall along a continuum, and *any* dividing line anyone draws would be open to the objection, ‘Consider his brother....’ The only criterion that would survive would be a criterion like caste – you are either in one caste or not. And so are your brothers. And, at least on the assertions of many a judge, you will never be able to climb out of it.

That regressive consequence is bad enough. There is another fact to consider: does that kind of criterion-via-the-brother not break down on exactly the same reasoning? After all, as the court reasoned, the requirement of Articles 15(4) and 16(4) is to identify socially and educationally backward classes. It is entirely possible that though two brothers belong to the same caste by virtue of their birth, one of them has studied, prospered and is now looked up to in their social circle, and the other has remained ill-lettered, and continues to be placed in the position in which his caste is held. The former is no longer ‘socially and educationally backward’, the latter surely is. Hence, is the caste any more reliable than the size of holding or the level of pension?

Similarly, read the observations by which the court concludes that pensioners though of one grade – say, Grade *TV* – are not a homogeneous group. And assess whether any caste designated as ‘backward’ is a homogeneous group. How come the Supreme Court struck down pensioners as a category but has accepted these interminable lists of castes?

In any event, on good reasoning or not, the scales had been tilted away from economic criteria.

Warnings brushed aside

Caste became *de rigueur*. Some judges, of course, continued to warn that using caste as the basis of classification would only perpetuate the very evil that the progressives were wailing against, and to counsel that all concerned shift to economic criteria.

In *Vasanth Kumar*, Justice A.P. Sen forcefully pointed out that both because of necessity as well as because of the commitment that had been made in the Constitution, the socially and educationally backward must be helped. ‘But unfortunately the policy of reservation hitherto formulated by the Government for the upliftment of such socially and educationally backward classes of citizens is caste oriented,’ he said, ‘while the policy should be based on economic criteria.’ He emphasized two considerations in particular why this should be so. First, he said, only if this were done could caste be removed while making special provisions under Articles 15(4) and 16(4). Second, he said, ‘At present only the privileged groups within the backward classes reap all the benefits of such reservation with the result that the lowest of the low who are stricken with poverty and are therefore socially and educationally backward remain deprived though these constitutional provisions under Articles 15(4) and 16(4) are meant for their advancement.’

Therefore, he said, the present caste-based criteria should be replaced by a two-step process. In the first instance, gauge the poverty of the person. Second, assess him by some direct measures of social and educational backwardness. And, he added, a point the significance of which we shall soon see, ‘caste and subcaste should be used only for purposes of identification of persons comparable to Scheduled Castes and Scheduled Tribes.’²⁵

Justice D.A. Desai was equally forthright. “This over-simplified approach [of looking at caste and deducing backwardness, etc.] ignored a very realistic situation existing in each caste, that every such caste whose members claim to be socially and educationally backward, has well-placed segments... In fact, upper crust of the same caste is verily accused of exploiting the lower strata of the same caste.’ He recalled how the Rane Commission appointed by the Gujarat government had come to ‘an irrefutable conclusion’ that among the castes that were agitating to be recognized as backward only the lower-income groups were socially and educationally backward.²⁶ ‘The assumption that all members of some caste are equally socially and educationally backward is not well founded,’ he said, reviewing the findings of commissions and committees. ‘...It is recognized without dissent that the caste based reservation has been usurped by the economically well placed section in the same caste,’ he pointed out, and cited a case that he had himself to deal with in the Punjab High Court where he saw how ‘the labeled weak exploits the really weaker.’ A little later, he stressed again, ‘Reservation in one or other form has been there for decades. If a survey is made with reference to families in various castes considered to be socially and educationally backward, about the benefits of preferred treatment, it would unmistakably show that the benefits of reservations are snatched away by the top creamy layer of the backward castes. This has to be avoided at any cost.’²⁷

The judge cited with approval the findings of the sociologist, I.P. Desai, who argued that ‘if the State accepts caste as the basis for backwardness, it legitimizes the caste system which contradicts secular principles, and, secondly, traditional caste system has broken down and contractual relationships between individuals have emerged.’ The Constitution has envisaged a casteless, classless society, Justice Desai stressed. ‘In order to set up such a society, steps have to be taken to weaken and progressively eliminate caste structure,’ he added. ‘Unfortunately, the movement is in the reverse gear. Caste stratification has become more rigid to some extent, and where concessions and preferred treatment schemes are introduced for economically disadvantaged classes, identifiable by caste label, the caste structure unfortunately received a fresh lease of life. In fact there is a mad rush for being recognised as belonging to a caste which by its nomenclature

would be included in the list of socially and educationally backward classes.’

To illustrate what was happening as a result of these caste-based reservations, Justice Desai pointed to the pressures that were put on the Bakshi Commission in Gujarat and the Mandal Commission for including ever larger number of castes in the backwards’ list. The Gujarat Government had been forced as a result to appoint a second commission, the Rane Commission. This Commission ‘took note of the fact that there was an organised effort for being considered socially and educationally backward castes,’ so much so that ‘some of the castes just for the sake of being considered as socially and educationally backward, have degraded themselves to such an extent that they have no hesitation in attributing different types of vices to and associating other factors indicative of backwardness with their castes.’ The perversion was such that the Commission had devised criteria other than caste to gauge backwardness.²⁸

Justice Desai stressed, ‘If State patronage for preferred treatment accepts caste as the only insignia for determining social and educational backwardness, the danger looms large that this approach alone would legitimize and perpetuate the caste system. It does not go well with our proclaimed secular character as enshrined in the Preamble to the Constitution.’ He, therefore, urged that the country abandon caste as the criterion for assessing backwardness, that it adopt poverty as the criterion and thereby strike at the root of both – the caste system as well as poverty.

And finally, Justice Desai pointed to a vital truth: ‘Reservation must have a time span,’ he stressed, ‘otherwise concessions tend to become a vested interest.’²⁹

In his brief, ‘skeletal’ observation, Justice Y.V. Chandrachud also gave counsel to the same effect. While the existing practice may be continued for fifteen years, he wrote, after that period reservations must be regulated by a means test. Second, this means test must apply to the Scheduled Castes and Tribes also. As for Other Backward Classes, a twin test must be applied: only those sections must be considered for reservations whose condition is comparable to that of Scheduled Castes and Tribes; and, within the groups that qualify on this criterion, the means test must be applied. Finally, the policy of reservations must be reviewed every five years or so.³⁰

All to no avail.

Strained history

Justice E.S. Venkataramaiah maintained that ‘the expression ‘backward classes’ used in the Constitution referred only to those who were born in particular castes, or who belonged to particular races or tribes or religious minorities which were backward.’

His reasoning is most instructive in that it shows the lengths to which a judge can go to reach a conclusion he has chosen to reach. To fathom the meaning of ‘socially and educationally backward classes’ in Articles 15(4) and 16(4), he turns to the way the articles – 338 and 340 – came to be formulated by which seats were reserved for Scheduled Castes and Tribes in legislatures. This subject – of reservations in legislature – had been entrusted to the Committee on Minorities, and the part – XVI – in which they were listed in the draft Constitution was entitled ‘Special Provisions Relating to Minorities’. The relevant articles were eventually passed with the amendment that wherever the word ‘minorities’ occurred in Part XVI, the words ‘certain classes’ should be substituted. He reasons that there are two significant aspects to this usage.

First, that ‘the expression “backward classes” used in Part XVI of the Constitution and in particular in Article 338(3) is used along with the Scheduled Castes, the Scheduled Tribes and the Anglo-Indian community.’ ‘The meaning of backward classes has, therefore, to be deduced having regard to the other words preceding it,’ he says. Because, he explains, ‘It is a rule of statutory construction that where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified.’ Second, he adds a while later, ‘the word “classes” was substituted in the place of the word “communities” by the Constituent Assembly just at the last moment.’ He also recalls a subsequent speech in Parliament of Dr Ambedkar to the effect that backward classes are ‘nothing else but a collection of certain castes’.³¹

Consider the ‘reasons’ in turn.

As for specific words occurring after general words, should we not infer that, as the words ‘backward classes’ are followed by the words ‘Scheduled Castes and Scheduled Tribes’, to be identified as a ‘Backward Class’, the

condition of the group must be akin to and as steeped in privation as that of Scheduled Castes and Tribes? That has important policy implications. But we shall soon see how so many of the judges balk at that conclusion.

In any event, does the very fact that one set of words is used and not the other, and that too in such close proximity, not signify that the Constitution makers wanted us to make sure that we thought of an entity *different from* the latter set? Recall what Justice Subba Rao pointed out in this very context: nothing prevented the framers from using ‘castes’ instead of ‘classes’. Moreover, the expression ‘socially and educationally backward classes’ is very specific by itself: why does it need to be clarified by words before or after it? A class that is backward both socially and educationally – what is so vague about the expression that its meaning must be clarified by importing ‘castes’ from the neighbourhood?

Identical questions arise in regard to Justice Venkataramiah’s observation that the substitution was made ‘just at the last moment’. The substitution *was* made – that is the first point, and it should lead us to realize that one entity and *not* the other is meant. Second, that it was made even though ‘just the last moment’ was left, *redoubles* the reason for us to realize that the framers were serious to have us identify an entity different from the one we would have identified from the earlier expression. Furthermore, the expression ‘socially and educationally backward classes’ occurs in other parts of the Constitution also – parts that have a legislative history very different from Part XVI on which the judge has chosen to focus. Why should we not infer its import by looking up other words used to specify the groups for which special measures are to be taken? ‘Socially and educationally backward classes of citizens’ in Articles 15 and 16, not castes; ‘weaker sections of the people’ in Article 46, not castes.

And how valid is Justice Venkataramiah’s inference that this change was made just ‘at the last moment’? The least that one can say is that the assertion that the word ‘backward’ was put in ‘at the last moment’ is indeed surprising, all the more so as it falls from an academically inclined judge. Even a cursory glance through successive drafts of the article, the discussions in the committees, the proposals of members on the draft text, the observations of the constitutional advisor on those proposals discloses that the words of this article went through as much scrutiny and exchange as of other parts of the Constitution. Once the draft was circulated, one

member wanted the Constitution to guarantee that there would be no discrimination not just in 'public employment' but also in employment in any enterprise. Another cautioned against the affirmative assurance that had been written into the text, and warned that it would spawn heaps of litigation. Others debated the impact the words would have on provisions that already existed in different provinces and princely states. Ambedkar wanted the decision of the executive in this regard to be made non-justiciable. Another member advocated that reference be made to 'minorities'. Still another proposed enlarging the scope beyond governmental employment and encompassing 'occupation, trade, business or profession'. Several members advanced rival proposals regarding the word 'backward'. Was it necessary at all? Should it be accompanied by 'economically or culturally'? Should it be accompanied by 'Scheduled Castes'? Should there be a reference in addition to persons who reside in a state?...³² In view of all this, patent as it is from the published record, how can one make light of the word on the ground that it was sort of slipped in 'at the last moment'?

As for Dr Ambedkar saying something subsequently in Parliament, he also told Parliament on 2 September 1953, 'People always keep saying to me: "O, you are the maker of the Constitution." My answer is I was a hack. What I was asked to do, I did much against my will... Sir, my friends tell me that I have made the Constitution. But I am quite prepared to say that I shall be the first person to burn it out. I do not want it. It does not suit anybody...' Should we go by that also? Or by his 'explanation' a few days later – that the Constitution had been a good temple but that it had since been taken over by asuras, and that is why he had said that it should be burnt down?

Reasons examined

Justice Venkataramiah also gave two minor reasons for taking 'classes' to mean 'castes'. For one thing it is caste that is pervasive as well as durable in India. He quoted the Backward Classes Commission report to the effect that 'The Brahmin taking to tailoring does not become a tailor by caste. A Brahmin may be a seller of boots and shoes, and yet his status is not lowered thereby' Surely, the answer to the opposite question tells us as

much about India today: when a person who was born into a caste that has been enumerated in a schedule becomes a journalist or an IT professional or a film star or a cricket player, is he looked upon as someone from a caste or as a journalist/IT professional/film star/cricket star? The even more important consideration while designing policies to help lift him is, ‘Should ameliorative measures be designed so that they erase the stigma of caste or reinforce it?’ The judge is not detained by any consideration of this kind.

Finally, Justice Venkataramiah argues, when caste is not taken into account, anomalies erupt. He recalls the judgment of the Supreme Court itself in *State of Uttar Pradesh v. Pradip Tandon*³³ to illustrate the point. The UP Government had announced two kinds of reservation – for those who had been born in rural areas on the ground of poverty, and for those from the Uttarakhand region as the areas themselves were backward. The Supreme Court struck down the former – 80 per cent of the population cannot be a homogeneous group, it reasoned. It upheld the latter – the region is manifestly backward, the court reasoned, it lacks development, communications, literacy.

Justice Venkataramiah says that the judgment suffers from an ‘inherent inconsistency’ between these two parts: rural areas as well as Uttarakhand are regions; reservations for one have been struck down, reservations for the other have been upheld. The anomaly would not have arisen had the government or, later, the court taken caste into consideration. If castes that are backward had been specified, reservations in both rural areas and Uttarakhand would have been consistent with the requirements of the Constitution.³⁴ The inadequacy of this prescription becomes at once apparent when we consider a region like the Northeast in which caste does *not* figure the way it does in UP and Bihar. Would the ‘inconsistency’ have been cured by specifying the reservations in terms of caste? On the other side, would caste consciousness and caste politics not have been injected into a pristine area by doing so? Moreover, isn’t there a direct way of removing that ‘inherent inconsistency’? Would it not automatically disappear if a direct economic test were used for determining backwardness?

A vital prescription ignored

Such are the reasons by which even an academically inclined judge tried to establish that ‘class’ meant ‘caste’. But he added an all-important caveat, one which, as we shall see, has been totally obscured in the ensuing years. As others had before him, Justice Venkataramiah pointed out that, even as backward classes are taken to mean backward castes, unless the restriction is introduced that only those castes would be given reservations as OBCs whose condition is similar to that of the Scheduled Castes and Tribes, ‘it would become possible for the Government to call any caste or group or community which constitutes a powerful political lobby in the state as backward even though in fact it may be an advanced caste or group or community but just below some other forward community.’ Unless reservations are restricted in this way, ‘the benefit of reservation would invariably be eaten up by the more advanced sections,’ and ‘in that event the whole object of reservation would become frustrated.’

On the other hand, if such a restriction is adopted, ‘it will not only reduce the number of persons who will be eligible for the benefits under Article 15(4) and Article 16(4)... at the same time it will also release the really backward castes, groups and communities from the stranglehold of many advanced groups which have had the advantage of reservation along with the really backward classes for nearly three decades.’ ‘It is time that more attention is given to those castes, groups and communities who have been at the lowest level suffering from all the disadvantages and disabilities (except perhaps untouchability) to which many Scheduled Castes and Scheduled Tribes have been exposed but without the same or similar advantages that flow from being included in the list of Scheduled Castes and Scheduled Tribes,’ the judge said.

Accordingly, government should, in addition to caste, incorporate a means test, and accord reservation on the basis of three interrelated criteria: the condition of the caste group should be similar to that of the Scheduled Castes and Tribes; within that group, those who qualify by a means test should be eligible; and the caste group should be inadequately represented in the services of the state.³⁵

Reality to the rescue

For the truly progressive judge, of course, all this is too hedged in, it is apologetic. He does not strain himself the way a Justice Venkataramiah does. He ‘goes for the substance not the words’!

In *Vasanth Kumar*, Justice O. Chinnappa Reddy commences his judgment with an observation that would lead anyone to conclude that the basis for the reservation policy, that is caste as the criterion for classification, must be abandoned and another adopted. The judge writes:

Over three decades have passed since we promised ourselves ‘justice, social, economic and political’ and ‘equality of status and opportunity’. Yet, even today, we find members of castes, communities, classes or by whatever name you may describe them, *jockeying for position, trying to elbow each other out, and, vying with one another to be named and recognised as ‘socially and educationally backward classes’*, to qualify for the ‘privilege’ of the special provision for advancement and the provision for reservation that may be made under Articles 15(4) and 16(4) of the Constitution. The paradox of the system of reservation is that *it has engendered a spirit of self-denigration among the people*. Nowhere else in the world do castes, classes or communities queue up for the sake of gaining the backward status. Nowhere else in the world is there competition to assert backwardness and to claim ‘we are more backward than you.’ This is an unhappy and disquieting situation, but it is stark reality. Whatever gloss one may like to put upon it, it is clear from the rival claims in these appeals and writ petitions that the real contest here is between certain members of two premier (population-wise) caste-community-classes of Karnataka, the Lingayats and the Vokkaligas, each claiming that the other is not a socially and educationally backward class and each keen to be included in the list of socially and educationally backward classes. To them, to be dubbed a member of the socially and educationally backward classes is a passport for entry into professional colleges and State services; so they jostle with each other and in the bargain, some time they keep out and sometimes they usher in some of those entitled to legitimate entry, by competition or by reservation....³⁶

But isn’t that exactly what the critics of basing reservations on caste had predicted all along would happen? Is the precise situation that the judge is depicting not a compelling argument for basing special measures on criteria other than caste? Does the persistence of such invidious distinctions and pursuits after decades of caste-based reservations not suggest that this way of dealing with the problem has failed, and should be replaced?

Justice Chinnappa Reddy’s inference, however, is the opposite. The reason for it can be gleaned in the gentle hint that Justice H.R. Khanna gave in *N.M. Thomas*: ‘the doctrinaire approach’. The empirical rationale for sticking to that approach perhaps lies in the words that Justice Reddy uses: ‘This is an unhappy and disquieting situation, but it is stark reality....’

Judges apart, that is the central proposition of progressives throughout: their ideology compels them to treat caste as regressive; they have poured venom on Hinduism asserting that it has spawned this oppressive, reactionary compartmentalization of human beings; but their politics is as caste-based as that of anyone else. How are they to reconcile the two? How are they to adopt and embrace, and rationalize embracing that reactionary compartmentalization? By putting the blame on ‘stark reality’! ‘This is an unhappy and disquieting situation, but it is stark reality....’

‘Social status and economic power are so woven and fused into the caste system in Indian rural society that one may, without hesitation, say that if poverty be the cause,’ Justice Chinnappa Reddy writes, ‘caste is the primary index of social backwardness, so that social backwardness is often readily identifiable with reference to a person’s caste...’³⁷ And again, ‘there is an over-powering mutuality between poverty and caste on the Indian scene...’³⁸ So pervasive is caste in Indian society because of Hinduism that it is present even in religions that eschew it – Sikhism, Christianity, Islam...

That asserted, the judge tosses out the proposition that the condition of castes which are selected for reservations under the rubric ‘other socially and educationally backward classes’ should be akin to that of Scheduled Castes and Tribes. True, earlier judgments contain admonitions to this effect, he allows. But, contrary to what is apparent from the face of the text of the judgments, he declares, ‘We do not think that these observations were meant to lay down any proposition that the socially backward classes were those classes of people, whose conditions of life were very nearly the same as those of the Scheduled Castes and Tribes.’

The reasons he gives are instructive – we have in them yet another instance of rationalizations for conclusions decided a priori. ‘We say so first because of the inappropriateness of applying the ordinary rules of statutory interpretation to interpret constitutional instruments which are *sui generis* and which deal with situations of significance and consequence,’ the judge begins. ‘It is not enough to exhibit a Marshallian awareness that we are expounding a Constitution; we must also remember that we are expounding a Constitution born in the mid-twentieth century, but of an anti-imperialist struggle, influenced by constitutional instruments, events and revolutions elsewhere, in search of a better world, and wedded to the idea of justice,

economic, social and political to all.’ ‘Such a Constitution must be given a generous interpretation,’ he says, ‘so as to give all its citizens the full measure of justice promised by it. The expositors of the Constitution are to concern themselves less with mere words and arrangement of words than with the philosophy and the pervading ‘spirit and sense’ of the Constitution, so elaborately exposed for our guidance in the Directive Principles of State Policy and other provisions of the Constitution.’ Restricting the benefits of reservation in the manner suggested would leave out many castes, he apprehends:

Now, anyone acquainted with the rural scene in India would at once recognise the position that the Scheduled Castes occupy a peculiarly degraded position and are treated, not as persons of caste at all, but as outcastes. Even the other admittedly backward classes shun them and treat them as inferior beings. It was because of the special degradation to which they had been subjected that the Constitution itself had to come forward to make special provision for them. There is no point in attempting to determine the social backwardness of other classes by applying the test of nearness to the conditions of existence of the Scheduled Castes. Such a test would practically nullify the provision for reservation for socially and educationally backward classes other than Scheduled Castes and Tribes.

Notice the mode and sequence of reasoning: not, ‘This is the criterion; hence, groups A and B should be given reservations, groups X and Y should not;’ instead, ‘Groups X and Y must be given reservations, hence this should not be the criterion.’

By restricting the benefit, the criterion would only enable the existing patterns of domination to be perpetuated, the judge says: ‘Such a test would perpetuate the dominance of the existing upper classes. Such a test would take a substantial majority of the classes who are between the upper classes and the Scheduled Castes and Tribes out of the category of backward classes and put them at a permanent disadvantage. Only the ‘enlightened’ classes will capture all the “open” posts and seats and the reserved posts and seats will go to the Scheduled Castes and Tribes and those very near the Scheduled Castes and Tribes. The bulk of those behind the “enlightened” classes and ahead of the near Scheduled Castes and Tribes would be left high and dry, with never a chance of improving themselves.’³⁹

In a word, the object of the revolutionary Constitution is to overturn and end the old and cruel system of domination. This can only happen if we

build on existing ‘stark reality’ and accept caste as the basis of reservation; but simultaneously extend the benefit of reservation to a large enough number of castes which are not as disadvantaged by that cruel system as the Scheduled Castes and Tribes.

But why not opt for poverty and other, ‘secular’ indices of deprivation? “The idea that poor Brahmins may also be eligible for the benefits of Articles 15(4) and 16(4) is too grotesque even to be considered,” says Justice Chinnappa Reddy. Does the subjective revulsion of the Judge – ‘...too grotesque even to be considered’ – qualify as a reason in law? ‘Similarly, no one can possibly claim that the Patels of Gujarat, the Kayasthas of Bengal, the Reddys and Kammas of Andhra Pradesh are socially backward classes, despite the fact that the majority of them may be poor farmers and agricultural labourers. In the rural, social ladder they are indeed high up and despite the economic backwardness of sizeable sections of them, they cannot be branded as socially backward....’⁴⁰ And that’s it.

The judge gives one further argument for shunning economic criteria – the powerful will manipulate it, he says. To recall his words,

How is one to identify the individuals who are economically backward, and, therefore, to be classified as socially and educationally backward? Are all those who produce certificates from an official or a legislator or some other authority that their family incomes are less than a certain figure to be so classified? It should be easy to visualise who will obtain such certificates. Of course, the rural elite, the upper classes of the rural areas who don’t pay any income tax because agricultural income is not taxed. Who will find it difficult or impossible to obtain such certificates? Of course, the truly lower classes who need them most.⁴¹

And what of the electorally powerful castes? Are they not manipulating the reservations system? By getting themselves anointed ‘Backwards’ to begin with? But a progressive like Justice Chinnappa Reddy would never accept that manipulation as a reason for doing away with either reservations or for removing those dominant castes from the Backwards’ list.

Is it not a telling circumstance that progressives do not cavil at income being used to classify that very rural population into ‘Below Poverty Line’ and ‘Above Poverty Line’ families for purposes of the public distribution system, but are certain that the same criterion will be manipulated by the powerful if it is used for assessing eligibility for reservations?

What a progression! To get over the Constitution's deliberate use of the word 'class' instead of 'caste', it came to be held that in any case a 'caste' is also a 'class' – a proposition that means no more than our saying, "The chairs in this room are a class" in that they too are a collection of entities. That 'A caste is also a class' became 'Caste has always been recognized as a class'. And that has now been taken to mean 'Rooting things in "castes" in fact fulfils the requirement of the Constitution that we formulate schemes for 'classes'.'

A test that is mandatory in one instance, and forbidden in another!

Justice Kuldeep Singh is emphatic: the creamy layer must be skimmed off by a means test, otherwise the benefits of reservations will be 'chewed up' by it. Setting out the reasons, the judge points out that even within a class that has been identified as Backward there will be individuals who 'may have individually crossed the barriers of backwardness', and that 'It is often seen that comparatively rich persons in the backward class – though they may not have acquired any higher level of education – are able to move in the society without being discriminated socially' Therefore, they do not suffer from the infirmity which is the rationale for reservations. Moreover, these well-off persons within the backward class are no different in their behaviour towards and treatment of the poorer sections of that class: 'The members of the backward class are differentiated into superior and inferior,' the judge writes. 'The discrimination which was practised on them by the superior class is in turn practised by the affluent members of the backward class on the poorer members of the said class.' As for measures such as the ones we are considering, 'The benefits of special privileges like job reservations are mostly chewed up by the richer or more affluent sections of the backward classes and the poorer and the really backward sections among them keep on getting poorer and more backward. It is only at the lowest level of the backward class where the standards of deprivation and the extent of backwardness may be uniform.' That has an immediate implication for policies of the state: "The jobs are so very few in comparison to the population of the backward classes that it is difficult to give them adequate representation in the state services. It is, therefore, necessary that the benefit of the reservation must reach the poorer and the

weakest section of the backward class. Economic ceiling to cut off the backward class for the purpose of job reservations is necessary to benefit the needy sections of the class...'⁴²

Justice Sawant too is emphatic as far as the test itself is concerned – identifying and hiving out the creamy layer is mandatory, he declares. But an economic means test must not be the sole criterion for identifying who falls within this layer, the judge maintains. The reason he gives is a curious one: if a means test is used as the sole criterion, all seats that have been reserved will be hogged by the socially and educationally advanced among the poor.⁴³ Does the reason not work the other way too? That is, as Justice Kuldeep Singh points out, if the well-to-do are not hived away, they will hog the reservations for the socially and educationally backward class?

Apart from maintaining that the creamy layer must not be identified solely by an economic criterion, Justice Sawant adds a condition that would in fact prevent anyone from being excluded for an indefinite time in the future. He says that the test for identifying a person or section as falling within the creamy layer of a backward class must be that he has acquired the 'social capacities' that are necessary for him to compete with the forwards. 'The correct criterion for judging the forwardness of the forwards among the backward classes,' he writes, 'is to measure their capacity not in terms of the capacity of others in their class, but in terms of the members of the forward classes....' And in assessing whether he has acquired the 'social capacities' to compete with the forwards, we must weigh whether he is now able to compete with them not for Class IV and Class V jobs in a service but for higher posts. 'If the adequacy of representation in the services... is to be evaluated in terms of qualitative and not mere quantitative representation,' the judge says, 'which means representation in the higher rungs of administration as well, the competitive capacity should be determined on the basis of the capacity to compete for the higher level posts also. Such capacity will be acquired only when the backward sections reach those levels or at least, near those levels. Till that time, they cannot be called forwards among the backward classes, and taken out of the backward classes.'⁴⁴

Justice Ratnavel Pandian goes the whole hog! He will have nothing of the means test at all. He says it is 'totally unworkable', that the moment one

analyses it one realizes that ‘it is not a decisive test but on the other hand will serve as a protective umbrella for many to get into this segregated section by adopting all kinds of illegal and unethical methods’ – the judge must mean that the test would be circumvented to get *out of* the segregated creamy layer. The reasons he gives are quaint indeed, and give us a glimpse of the sorts of imaginings by which a judge rejects or accepts propositions when he wants to.

Assume, an annual salary of Rs X has been taken as the ceiling so that, if a person is getting above X, he and his family members will be excluded from reservations. A government servant could escape under the ceiling, the judge says, by voluntarily going on leave; a person owning land could dodge the ceiling by leaving his land fallow in a particular year, or, better still, by selling a part of his land so as to reduce his income in a given year below Rs X!

And, of course, ‘fluctuating fortunes or misfortunes’ will influence who gets pushed into the creamy layer in any year.

And then there are the two brothers we have met in *Janki Prasad Parimoo*: they belong to the same backward class family; one is employed in government, the other in a private company, or is a professional. If the annual income of the government employee slightly exceeds the ceiling limit, the judge fears, his children will not fall within the category of ‘poorer sections’ while ‘the other brother can deceitfully show his income within the ceiling limit so that his children can enjoy that benefit.’ But didn’t the judge himself just tell us that the government servant would have no greater difficulty in escaping the ceiling by taking leave and lowering his income for that year ‘slightly’?

The same sort of difficulties will arise among pensioners, the judge fear – in the sense presumably that the pensioner will have a more difficult time escaping the ceiling than his brother who is in a profession in which it is easier to camouflage one’s income.

And then there is the case of a person from a backward class who is ‘on the verge of retirement’. His income may exceed X this year, and he may therefore be counted among the ‘creamy layer’. But next year, when he has nothing but his pension, he may have to be excluded from it. Assume that to be the case. His income having gone down drastically, how is it unjust to

exclude him? And how does excluding him impose some unbearable burden on those administering the reservations scheme?

And then a person may be among the backward today, but may ‘suddenly go out of its purview by any intervening fortuitous circumstances such as getting a marital alliance in a rich family or by obtaining any wind-fall wealth’ – why he should not be excluded in such circumstances, the judge of course does not explain!

‘The above are only by way of illustrations,’ the judge says, ‘though this type can be multiplied, for the purpose of showing that a person can voluntarily reduce his income and thereby circumvent the declared law of this Court. In all the above illustrations... the chance of “getting into or getting out of” the definition of “poorer sections” will be *like a see-saw* depending upon the fluctuating fortunes or misfortunes.’

Moreover, the means test ‘may severally suffer from the vice of corruption and also encourage patronage and nepotism’.

And the means test ‘is highly impressionistic test, the result of which is likely to be influenced by many uncertain and imponderable facts... It may theoretically sound well but in practice attempts may be made in an underhanded way to get round the problem.’⁴⁵

Would each and every one of these ‘reasons’ not entail that all taxation should be abolished? What about the identification of families as being ‘below the poverty line’ and above it for purposes of the public distribution system? Do those fluctuations in fortunes affect that cut-off point any the less? Is that identification any less ‘impressionistic’? Is it less amenable to deceit, to corruption, to nepotism?

Any argument will do! As will any quotation!

In *Indra Sawhney*, Justice Jeevan Reddy, accepting an argument advanced from the Bar, recalled that while the Supreme Court had struck down caste-based lists in *Champakam*, in *B. Venkataramana*, a case decided by the same bench on the same day, the court did not object to a list that was as much based on caste as the one in *Champakam*. The judge went further, and advanced a caricature of an argument. He held that, as every Hindu has a caste, it would always be possible for a Hindu who had been excluded – presumably on any criterion other than caste – to argue that he had been

excluded because of his caste. In support, he quoted a passage from the speech Dr Ambedkar had made in Parliament during the debate on the first amendment to the Constitution. It is instructive to read what Ambedkar had actually said, and the use to which Justice Jeevan Reddy puts the passage – for it gives us yet another glimpse of the mode of argumentation of progressives bent upon advancing a cause.

Ambedkar had said:

Then with regard to Article 16, clause (4), my submission is this that it is really impossible to make any reservation which would not result in excluding somebody who has a caste. I think it has to be borne in mind and it is one of the fundamental principles which I believe is stated in *Mulla's* edition on the very first page that there is no Hindu who has not a caste. Every Hindu has a caste – he is either a Brahmin or a Mahratta or a Kund by or a Kumbhar or a carpenter. There is no Hindu – that is the fundamental proposition – who has not a caste. Consequently, if you make a reservation in favour of what are called backward classes which are nothing else but a collection of certain castes, those who are excluded are persons who belong to certain castes. Therefore, in the circumstances of this country, it is impossible to avoid reservation without excluding some people who have got a caste.⁴⁶

The inference that the Judge draw – namely, that, as every Hindu has a caste, if he is excluded he would have been excluded because of his caste – does not follow at all. Assume, there is a means test – for reservations or for subsidized foodgrain. A person with an income above the prescribed limit is excluded. He may have a caste, as he may have a religion, as he may be residing in a particular state, as he may be of Mongoloid or Scythian stock. But he would not have been excluded because of his caste any more than he would have been excluded because of his religion or residence or race. That is obvious, and yet the judge presses the passage and his inference from it!

But at least that is a speech Ambedkar delivered in 1952! To support the proposition that class is caste in India, in *Indra Sawhney*, the judges cite a speech that Ambedkar is said to have made at Columbia University.⁴⁷ It turns out that that particular speech was made by him in 1916 – when he was twenty-five! If a speech made by Ambedkar when he was twenty-five is so conclusive, why not what Pandit Nehru wrote to the chief ministers at the height of his prime ministership?

‘One has to begin the process of identifying the backward somewhere,’ the judges say in *Indra Sawhney*. ‘Might as well begin with castes.’⁴⁸ But

why not begin somewhere else? Why not adopt the alternate route which will eschew castes? In the same judgment, Justice R.M. Sahai, for instance, urges that the identification begin with occupation; that it next move to social acceptability; from there to a means test; and finally to an assessment of whether the group that has been identified is adequately represented in the services of the state.⁴⁹ Would a route of this sort not conform better to the provisions of the Constitution?

Ever so often, progressive judges advance their line by just the order they impose on causation! Article 16(4) speaks of ‘any backward class of citizens’. That could be an economically backward class. It could be an educationally backward class. Justices Jeevan Reddy and Pandian insist that the expression ‘primarily means *socially* backward class’.⁵⁰ And that in practice, swiftly translates into Other Backward Castes!

Justice Sawant relies on another argument in addition. He says, ‘How does one identify the discriminated class is a question of methodology. [And hence need not detain the Court!]. But once it is identified, the fact that it happens to be a caste, race, or occupational group, is irrelevant. *If the social group has hitherto been denied opportunity on the basis of caste, the basis of the remedial reservation has also to be the caste.* Any other basis of reservation may perpetuate the status quo and may be inappropriate and unjustified for remedying the discrimination. When, in such circumstances, provision is made for reservations, for example, on the basis of caste, it is not a reservation in favour of the caste as a ‘caste’ but in favour of a class or social group which has been discriminated against, which discrimination cannot be eliminated, otherwise.’⁵¹

Would it then be right to say that the way to do away with corruption is more corruption? To do away with terrorism is more terrorism? To do away with murder is to make murder commonplace? That to do away with slavery, we should enslave ever larger numbers? That fraud is eliminated by all-encompassing fraud? Indeed, we scarcely need recourse to such indirect questioning. The way reservations have stoked casteism itself shows that, even if discrimination in the past was based on caste, the way to remove it is to *not* base it on caste. The way is to adopt such criteria as would dissolve caste, such criteria as would make people transcend caste and strive to

qualify on *those* criteria. The way is to stoke those technological changes, those processes of modernization as will erase caste.

Perspicacious judgments, and their warning

In his perspicacious judgment, Justice Kuldeep Singh is the one who spoke up for the core values of our religions as well as of our Constitution. He established beyond doubt that the approach of fellow judges, and, of course, what the politicians have been doing are, on the one hand, a gross assault on secularism; and, on the other, that they violate the basic tenets of our religions. He warned that what was being done was reviving casteism and that this in turn would divide our country. Reservations of jobs can be no remedy for backwardness in a country in which 74 per cent of the people are backward. Poverty is the root cause of social and educational backwardness. It is poverty, therefore, that must be removed, and this is where ‘successive governments, whether in the states or at the Centre, have been remiss in the discharge of their obligations, under the Constitution, towards the poor and backward people of the country.’ ‘Job reservation, as a dole, has been the vote-catching platter,’ the judge wrote. In any event, Articles 16(2) and 16(4) together forbid any classification that is based on caste, and the enumerations that have been adopted by state governments as much as the enumeration that has been set out by the Mandal Commission, the judge held, are based on little except caste.

The judgment addresses such vital concerns of our country, it is so clear on basics, it is so prophetic in the warnings it contains that I do hope that the day will come when it is taught in our classrooms. Here we can note just a few points from it.

Justice Kuldeep Singh notes the elemental point: the Constitution consciously uses the expression ‘classes’ and not ‘castes’ in Articles 15(4) and 16(4). It isn’t that the word ‘castes’ was unknown to them – they used it in the context of ‘Scheduled *Castes*’, but in every other context they eschewed it and used the secular expression ‘classes’.

Recalling declarations of the Supreme Court in *Chitralekha* and other cases, Justice Kuldeep Singh warned that by equating ‘classes’ and ‘castes’, the progressives are striking at a basic feature of the Constitution, namely, secularism. ‘Secular feature of the Constitution is its basic structure,’ the

judge noted. ‘Hinduism, from which the caste system flows, is not the only religion in India. Caste is an anathema to Muslims, Christians, Sikhs, Buddhists and Jains. Even Arya Samajis, Brahmo Samajis, Lingayats and various other denominations in this country do not believe in caste system. If all these religions have to co-exist in India – can “class” under Article 16(4) mean “caste”? Can a caste be given a gloss of a “class”? Can even the process of identifying a “class” begin and end with “caste”? One may interpret the Constitution from any angle the answer to these questions has to be in the negative.’

Turning to the assertion that has been used so often, and was being used by his fellow judges on the bench, Justice Kuldeep Singh stressed, ‘To say that in practice caste system is being followed by Muslims, Christians, Sikhs and Buddhists in this country, is to be oblivious to the basic tenets of these religions. The prophets of these religions fought against casteism and founded these religions. Imputing caste system in any form to these religions is impious and sacrilegious.’⁵²

Justice R.M. Sahai developed the matter further. The articles in question apply to *all citizens* of the country, he pointed out. Hence, the criteria that must be chosen for identifying backward classes must be such as can apply to *all* citizens. ‘Caste’ is not. Second, ‘When two words one wider in import and broader in application and other narrower were available and the Constitution-makers opted for one, the other, on elementary principle of construction, should be deemed to have been rejected.’ Justice Sahai added for good measure, ‘What was avoided by the Framers of the Constitution, for good reasons, and to achieve the objective they had set up for the governance of the country, cannot be brought back either by government or courts by interpretation or construction unless the consequences of accepting the literal or the normal meaning appear to be so unreasonable that the Constitution-makers would have never intended them.’ Nor can appeals to ‘the spirit of the Constitution’ carry one in that direction, he said, citing the judicial truth, ‘Although the spirit of an instrument especially of a Constitution is to be respected not less than its letter yet the spirit is to be collected chiefly from its words.’⁵³

An alibi exploded

‘But caste is a reality,’ progressive politicians, academics, judges had been intoning. So is religion. So is race. So is language. So is discrimination based on sex. Are provisions of the Constitution to be perverted by reading any of these into ‘classes’?, Justice Sahai inquired. His words contain a decisive refutation of this oft-used alibi. The Judge said, “Caste is a reality”. Undoubtedly so are religion and race. Can they furnish basis for reservation of posts in services? Is the State entitled to practice it in any form for any purpose? Not under a Constitution wedded to secularism.’ On the contrary, ‘State responsibility is to protect religion of different communities and not to practise it. Uplifting the backward class of citizens, promoting them socially and educationally, taking care of weaker sections of society by special programmes and policies is the primary concern of the State. It was visualized so by Framers of the Constitution. But any claim of achieving these objectives through race-conscious measures or religiously packed programmes would be uncharitable to the noble and pious spirit of the Founding Fathers, legally impermissible and constitutionally *ultra vires*.’

Justice Sahai nailed the rationalization that had been adopted by progressive judges of the Supreme Court itself, and the cases on which they had been relying. He wrote, ‘Deriving inspiration from the American philosophy that, “just as the race of students must be considered in determining whether a constitutional violation has occurred so also must race be considered in formulating the remedy” without any regard to the Preamble of our Constitution and provisions like Articles 15(1), 16(2) and 29(2) would be plunging our nation into disaster not by what was adopted and promised as the principle for governance for our people on our soil but from what has been laid down in a country which is yet far away from “equality of result” or “substantive equality” so far as *Black* or *Brown* are concerned.’⁵⁴

Two fundamental questions

Judgments have adduced several reasons to emphasize that OBCs as a class are envisaged to be different from Scheduled Castes and Tribes: the OBCs are socially and educationally disadvantaged but they do not suffer from the sort and extent of social privations as the SCs and STs. For one thing, they are mentioned separately in the Constitution. Second, had the Constitution intended them to be given the same facilities and concessions, it would have provided reservations for them also in the Lok Sabha. Third, the wording of the relevant provisions itself shows that the object of the Constitution in regard to the two categories is different: the object in regard to the SCs and STs is to end the discrimination of centuries, and lift them into the mainstream; the object in regard to the OBCs is to remove their social and educational handicaps and secure for them adequate representation in government services.¹

But from this fact – that the Constitution envisages them to be two different classes – opposite conclusions have been deduced. On the one hand, it has been inferred, for instance in *Chattar Singh*, that, as the two are distinct categories, OBCs are not entitled to receive the same sort of concessions and relaxations that are provided for SCs and STs. On the other hand, some judges have rested on the same proposition their view that, as the Constitution, realizing full well that the two are distinct classes, has provided for special measures to be taken for OBCs also, the condition of the latter need *not* be akin to that of SCs and STs for them to qualify for those measures, including reservations.

It is indeed symptomatic that, through the sorts of measures they approve for OBCs, the very progressives who denounce Hinduism for

fomenting the caste system rationalize a scheme that perpetuates and exacerbates that very caste system.

From the warnings they had sounded, judges as diverse in their perspectives as Justices V.R. Krishna Iyer, H.R. Khanna, A.R. Sen, D.A. Desai urged two further prescription – the ‘weaker sections’ and ‘Backward Classes’ to which reservations are extended must be, to use the words of Justice Krishna Iyer, not any ‘backward class’ but ‘those dismally depressed categories comparable economically and educationally to Scheduled Castes and Tribes’.

In a series of judgment – *Balaji*, *Janki Prasad Parimoo*, etc., the Supreme Court had held that only those groups should be subsumed in ‘Backward Classes’ whose condition is comparable to that of Scheduled Castes and Tribes. Once this norm is adopted, the court emphasized, difficulties in the way of specifying which groups should be included in this category would be eased.²

Returning to this requirement later in *N.M. Thomas*, Justice Krishna Iyer put the point in even stronger terms. He wrote:

I must repeat the note of caution earlier struck. Not all caste backwardness is recognised in this formula. To do so is subversive of both Article 16(1) and (2). *The social disparity must be so grim and substantial as to serve as a foundation for benign discrimination. If we search for such a class, we cannot find any large segment other than the Scheduled Castes and Scheduled Tribes. Any other caste, securing exemption from Article 16(1) and (2), by exerting political pressure or other influence, will run the high risk of unconstitutional discrimination. If the real basis of classification is caste, masked as backward class, the Court must strike at such communal manipulation.* Secondly, the Constitution recognizes the *claims* of only *harijans* (Article 335) and not of every backward class. The profile of Article 46 is more or less the same. So, we may readily hold that casteism cannot come back by the back door and, except in exceptionally rare cases, no class other than *harijans* can jump the gauntlet of ‘equal opportunity’ guarantee. Their only hope is in Article 16(4).³

For the several reasons that he had given and which we have glimpsed earlier, Justice D.A. Desai also emphasized that the group to which reservations are extended ‘must have the same indicia as Scheduled Castes and Scheduled Tribes’.⁴

A second prescription also flowed from the facts that successive judgments had noted – in particular, that there was much heterogeneity

within each caste, and that the better off within the caste were cornering the benefits that accrued from reservations. Justice Krishna Iyer, as has been his wont, had the most to say on the twin facts and their consequences. In *N.M. Thomas*, he wrote:

In the light of experience, here and elsewhere, the danger of 'reservation', it seems to me, is threefold. *Its benefits, by and large, are snatched away by the top creamy layer of the 'backward' caste or class*, thus keeping the weakest among the weak always weak and leaving the fortunate layers to consume the whole cake. Secondly, *this claim is overplayed extravagantly in democracy by large and vocal groups* whose burden of backwardness has been substantially lightened by the march of time and measures of better education and more opportunities of employment, but wish to wear the 'weaker section' label as a means to score over their near-equals formally categorised as the upper brackets. Lastly, a lasting solution to the problem comes only from improvement of social environment, added educational facilities and cross-fertilisation of castes by inter-caste and inter-class marriages sponsored as a massive State programme, and this solution is calculatedly hidden from view by the higher 'backward' groups with a vested interest in the plums of backwardism... In fact, research conducted by the A.N. Sinha Institute of Social Studies, Patna, has revealed a dual society among *harijans*, a tiny elite gobbling up the benefits and the darker layers sleeping distances away from the special concessions. For them, Articles 46 and 335 remain a 'noble romance', the bonanza going to the 'higher' *harijans*.

He, therefore, stressed the need for innovative administrative measures that would ensure that the benefits actually reached the intended target groups, the 'weakest of the weak'; detailed social science research to monitor who was receiving the actual benefits; and 'a constant process of objective re-evaluation of progress' Test a once deserving "reservation" should not be degraded into "reverse discrimination".⁵

Concluding his judgment, Justice Krishna Iyer said that 'The heady upper berth occupants from "backward" classes do double injury. They beguile the broad community into believing that backwardness is being banished. They rob the need-based bulk of the backward of the "office" advantages the nation, by classification, reserves or proffers.' As such, 'The constitutional *dharma*... is not an unending deification of "backwardness" and showering "classified" homage, regardless of advancement registered, but progressive exorcising of the social evil and gradual withdrawal of artificial crutches.' While noting that the condition of the *harijans* was such that benefits to them would have to be continued for quite some time, he

admonished all concerned for not doing their duty in this regard: ‘The Court has to be objective, resisting mawkish politics.’⁶

And in *Soshit Karamchari Sangh*, as we shall see in detail later, the same judge falls for exactly that – ‘mawkish politics’. When the point is advanced that the better off among *harijans* and the OBCs are hogging the benefits, he is dismissive. ‘Nor does the specious plea that because a few *harijans* are better off, therefore, the bulk at the bottom deserves no jack-up provisions merit scrutiny,’ he pronounces. *A swallow does not make a summer*. Maybe, the State may, when social conditions warrant, justifiably restrict *harijan* benefits to the *harijans* among the *harijans* and forbid the higher *harijans* from robbing the lowlier brethren.’ He returns to the prospect of benefits being gobbled up in general, and is equally dismissive: ‘Maybe, some of the forward lines of the backward classes have the best of both the worlds and their electoral muscle *qua* caste scares away even radical parties from talking secularism to them. *We are not concerned with that dubious brand*. In the long run, the recipe for backwardness is not creating a vested interest in backward castes but liquidation of handicaps, social and economic, by constructive projects. *All this is in another street and we need not walk that way now*.’⁷

Tied in knots

We will have occasion to consider Justice Krishna Iyer’s switch, his selective activism later. For the moment we may only note the problem that together the two propositions soon created. On the one side is the patent fact: while Articles 15(4) and 340 use the expression, ‘socially and educationally backward class of citizens’, Article 16(4) does not – it speaks of any ‘backward class of citizens’. On the other hand, has been the anxiety of progressives to extend reservations to Other Backward Castes.

Initially, as we have seen, progressive judges, anxious about their commitment to ‘*harijans and girijans*’ advanced three propositions. First, the expressions, ‘socially and educationally backward class of citizens’ and ‘backward class of citizens’ mean more or less the same thing. Second, to be entitled to reservations, the groups must be *both* socially *and* educationally backward. Third, the ‘Other Backward Classes’ that are identified must have been subjected to the same sort of extreme

discrimination as, and their present destitution must be comparable to, Scheduled Castes and Tribes.

These propositions tied the progressives in knots. For one thing, they ruled out of court many a caste that was demanding reservations, and which was vociferous enough so that anyone denying reservations to it would be certain to be denounced for being a high-caste protector of the status quo! Second, it did seem a bit odd that government jobs should be set aside for those who are by definition '*educationally backward*'.

Progressive judges have, therefore, modified their decisions in two ways. First, they have maintained that, while the Constitution uses the expression 'socially and educationally backward class of citizens', what it means is that they should be '*mainly* socially backward' – this is the gravamen of the judgment of Justice Jeevan Reddy and others in *Indra Sawhney*.⁸

Second, they have worked to sever the link between Scheduled Castes/Tribes and the Other Backward Castes, so called. Justice Chinnappa Reddy had already seen the restrictive implications of the condition that had been prescribed in judgments from *Balaji* onwards, including Justice Krishna Iyer's observations in this regard, and had, accordingly, expressed himself strongly against them in *Vasanth Kumar*. Those observations 'were not intended to lay down any proposition that the socially backward classes were those class of people whose conditions of life were very nearly the same as those of the Scheduled Castes and Tribes,' he declared. What else did the observations intend to do? A test of that kind, Justice Chinnappa Reddy argued, if accepted, 'would practically nullify the provision for reservation for socially and educationally Backward Classes other than Scheduled Castes and Tribes.'⁹

In *Indra Sawhney*, Justice Jeevan Reddy invokes this rejection, and builds on it. There is no reason to restrict or qualify the expression 'backward class of citizens', he maintains. Article 16(4) does *not* use the expression 'Scheduled Castes and Scheduled Tribes'. Therefore, 'there is no reason why we should treat their backwardness as the standard backwardness for all those claiming its protection.' In fact, even within the general category, 'Scheduled Castes and Scheduled Tribes', the groups are dissimilarly situated. If some other group suffers from as much privation

and has been the subject of comparable injustice, it may have a case for being included in the SC/ST list. There is no reason to insist that the condition of others should be comparable in privation and discrimination to that of the SCs/STs.¹⁰

The ‘pragmatic’ consideration, so to say, apart, namely that, if the test is adopted, too many of the OBCs will get shut out from reservations, Justice Jeevan Reddy’s thesis rests on the point that two different sets of expressions are used in Articles 15(4) and 16(4) – in particular, on the fact that the latter does *not* use the expression ‘Scheduled Castes And Scheduled Tribes’: how can the ‘backward classes’ it contemplates then be equated with Scheduled Castes and Tribes?, he and other judges demand.¹¹

Is it not a surprise then that the central fact that runs through all these article – that the Constitution uses the word *classes* and not *castes* – is so consistently disregarded by these very judges?

Justice R.M Sahai points to another vital word. Do not lose sight of the simple ‘is’ in Article 16(4), he says. The objective of the article is not to make reparations for historical injustices and discrimination. It is to enable the state to induct in its services those whose representation at present is inadequate.¹²

Why is there all this concern for a few reserved jobs being cornered by the creamy layer?, Justice Chinnappa Reddy demands in *Vasanth Kumar*. Are non-reserved jobs not cornered by the creamy layer? How does the snatching away establish that there should be no reservations? Strange as this may seem, it is exactly what the judge argues. The passage reads: ‘That a few of the seats and posts reserved for backward classes are snatched away by the more fortunate among them is not to say that reservation is not necessary. This is bound to happen in a competitive society such as ours. *Are not the unreserved seats and posts snatched away, in the same way, by the top creamy layer of society itself?* Seats reserved for the backward classes are taken away by the top layers amongst them on the same principle of merit on which the unreserved seats are taken away by the top layers of society. How can it be bad if reserved seats and posts are snatched away by the creamy layer of backward classes, if such snatching away of unreserved posts by the top creamy layer of society itself is not bad? This is a necessary concomitant of the very economic and social system under

which we are functioning. The privileged in the whole of society snatch away the unreserved prizes and the privileged among the backward classes snatch away the reserved prizes. This does not render reservation itself bad. But it does emphasise that mere reservation of a percentage of seats in colleges and a percentage of posts in the services is not enough to solve the problem of backwardness...'¹³

Justice Jeevan Reddy quotes this argument approvingly. He does allow, however, that the creamy layer should be hived off so that it does not hog the benefits of reservations. But he adds a caveat: the cut-off bar he permits is to be placed so high that hardly any one would be inconvenienced by it! A member of the Backward Class, say a carpenter, goes to the Middle East. He will earn quite a high income. But is he for that reason to be excluded from the Backward Class?, the judge asks. Are his children to be deprived of reservations? The only circumstance in which this may be done is '*if he rises so high economically as to become say a factory owner himself*'. Only in such a circumstance would his social status have risen to justify his being assumed to have moved out of the Backward Class.¹⁴

In *Indra Sawhney*, the Court returned to this issue, and prescribed in the clearest possible terms that the 'creamy layer' must be skimmed off from the 'Backward Classes' and excluded from the reservations that the State may decree.

The decisive formulation

In *Indra Sawhney*, eight of the nine judges held that the top 'creamy layer' must be excluded from the classes for which reservations are made. They gave a series of reasons for this conclusion.¹⁵

The Court gave a series of reasons why the 'creamy layer' must be excluded. First, it said, reservations are to be for a *class*. To be a *class*, the group must be homogeneous. When some in it are so clearly different from the others, it loses its character as a *class*. Correspondingly, the ones who have reached an 'advanced social level or status' would no longer belong to that 'Backward Class'. They are 'as forward' as a member of a forward class. 'If some of the members are far too advanced socially (which in the context necessarily means economically and may also mean educationally),

the connecting thread between them and the remaining class snaps.’ Hence, ‘After excluding them alone, would the class be a compact class.’ We must bear in mind that under the Constitution, reservations are being made for a *class* not for a caste, the court said.¹⁶

Second, the court emphasized repeatedly, that unless these advanced persons are excluded, they will hog all the benefits that legislation may seek to provide to the Backward Class, and the very purpose of reservations will be defeated.

In circumstances which will become apparent in a moment, the court was constrained to return to this matter seven years later. It reiterated what it had held in *Indra Sawhney*, but in even stronger terms. ‘If the forward classes are mechanically included in the list of backward classes or if the creamy layer among backward classes is not excluded,’ the Supreme Court stated in *Indra Sawhney-II*, ‘then the benefits of reservation will not reach the really backward among the backward classes. Most of the benefits will then be knocked away by the forward castes and the creamy layer...’¹⁷ And again, in even stronger terms, ‘When governments unreasonably refuse to eliminate creamy layers from the backward classes or when governments tend to include more and more castes in the list of Backward Classes without adequate data and inquiry, a stage will be reached soon when the whole system of reservation will become farcical and a negation of the constitutional provisions relating to reservations. The resistance of the creamy layer to get out of the lists is as bad as the clamour for entry into the quota system of various castes whose social status does not conform to the law decided by this Court...’¹⁸

Third, the court pointed out that retaining within a ‘Backward Class’ persons or groups who had actually transcended backwardness would amount to treating unequals equally, and thereby be a violation of the fundamental principle of equality. Conversely, when these advanced individuals and groups are accorded reservations and similarly placed individuals or groups who happen not to be from these designated castes are not accorded reservations, equals would be treated unequally, and that too would be a violation of the fundamental principle of equality. ‘As the “creamy layer” in the backward class is to be treated “on par” with the forward classes and is not entitled to benefits of reservation, it is obvious

that if the “creamy layer” is not excluded, there will be discrimination and violation of Articles 14 and 16(1) inasmuch as equals (forwards and creamy layer of backward classes) cannot be treated unequally,’ the court said. ‘Again, non-exclusion of creamy layer will also be violative of Articles 14, 16(1) and 16(4) of the Constitution of India since unequals (the creamy layer) cannot be treated as equals, that is to say equal to the rest of the backward class. These twin aspects of discrimination are specifically elucidated in the judgment of Sawant J,... The constitutional principle that equals cannot be treated unequally and unequals cannot be treated equally based on Articles 14 and 16(1) overrides other considerations... What we mean to say is that Parliament and the legislatures in this country cannot transgress the basic feature of the Constitution, namely, the principle of equality enshrined in Article 14 of which Article 16(1) is a facet.’

What the court was compelled to state in conclusion goes farther than reservations and raises a fundamental point. The court declared, ‘Whether creamy layer is excluded or whether forward castes get included in the list of backward classes, the position is the same, namely, that *there will be a breach not only of Article 14 but also of the basic structure of the Constitution*. The non-exclusion of the creamy layer or the inclusion of forward castes in the list of backward classes will, therefore, be totally illegal. *Such an illegality offending the root of the Constitution cannot be allowed to be perpetuated even by Constitutional amendment...*’¹⁹

That is the fundamental point that we must ponder. For the moment note that the Supreme Court has absolutely unambiguously and repeatedly directed that

- The creamy layer must be identified.
- The identification – and the consequent exclusion – of this lot must be real: in *Ashok Kumar Thakur v. State of Bihar*,²⁰ the Supreme Court came down heavily on the states of Bihar and UP for trying to get around this requirement by positing such ‘unrealistically high levels of income or other conditions’ as to reduce it to a nullity, and declared that they ‘had acted in a wholly arbitrary fashion and in utter violation of the law laid down in the Mandal case.’²¹

- The exercise of identifying the layer must be deliberate, and not just a mechanical one of going through the motions.
- It must seek to identify the advanced sections on relevant material.
- And the list must be reviewed periodically. ‘Once backward, always backward is not acceptable.’²²

‘Flouting with impunity’

In a word, the law and the requirements that flow from it have been laid down in the strongest terms and as unambiguously as possible. To gauge how the political class, in particular legislatures and governments, responded, consider what happened in a ‘progressive’ state like Kerala. The very case we are perusing, *Indra Sawhney-II*, provides a telling illustration.

Indra Sawhney-I had directed that both at the Central level and in the states, commissions be set up within four months to identify the creamy layer among backward castes. That case had been decided on 16 November 1992.

For three years the Kerala government did nothing to implement this direction.

The dereliction was taken to the Supreme Court. On 20 March 1995, the court issued a notice to the state to show cause why it should not be held guilty of having committed contempt.

The Kerala government filed an affidavit stating that an act had already been passed to set up the required commission, that it was just that the commission, more than once, had held that it did not have the power to identify the creamy layer. ‘In our opinion,’ the Supreme Court said, ‘these events were set out in the above affidavit filed by the Chief Secretary only to ward off any penal action for contempt of this Court. The above explanation was naturally found to be wholly unsatisfactory...’ The court held that the state had acted in ‘willful disobedience’ of its directions and had committed contempt. That was on 10 July 1995. The court gave the Government two months to purge the contempt.

On 13 July 1995, three days after the judgment, the Kerala Cabinet decided that a Standing Committee be set up to identify the creamy layer.

But ‘suddenly’, as the Supreme Court was to note later, on 27 July 1995, the government decided to continue the existing system of reservations.

With predictable alacrity, on 31 August 1995, an act was passed which stated, inter alia, that ‘having regard to known facts in existence in the state,’ ‘there are no socially advanced sections in any Backward Classes who have acquired capacity to compete with forward classes,’ that the Backward Classes remain inadequately represented in the services, and therefore, ‘Notwithstanding anything contained in any law or in any judgment, decree or order of any court or other authority,’ the system of reservations shall continue as it was at the time, and that the rules to enforce it ‘shall, for all purposes, be deemed to be and to have always been validly made’! The act was given retrospective effect from 2 October 1992 to boot.

Reviewing the act, the Supreme Court held that ‘the known facts’ on the basis of which the act was said to have been passed ‘were indeed non-existent’. It drew attention to the fact that the cabinet itself had decided to set up a commission to identify the creamy layer, and then within three weeks suddenly reversed itself. It drew attention to the fact that later, the Supreme Court had been constrained to appoint a High Level Committee under Justice Joseph, and that this committee had indeed identified such a layer without much difficulty. The court was, accordingly, led to conclude:

It appears to us, therefore... that the Kerala Act had shut its eyes to realities and facts... [and that] the declaration [in the Act about ‘known facts in existence’, etc.] made by the legislature has no factual basis in spite of the use of the words ‘known facts’. The facts and circumstances, on the other hand, indicate to the contrary. In our opinion, the declaration is a mere cloak and is unrelated to facts in existence...

The Supreme Court, therefore, set up a committee directly, and that committee submitted its report on 4 August 1997. As action even after that was tardy, the Supreme Court delivered a stinging judgment in *Indra Sawhney-II* in December 1999.

It recorded that ‘the Kerala Government has been already found to have deliberately violated the directions of this Court... and been held guilty of contempt of Court.’ The pattern that the actions of the government and the legislature which the court had documented pointed to even graver issues. The court said that ‘the unreasonable delay on the part of the Kerala Government and the discriminatory law made by the Kerala Legislature have been in virtual defiance of the rule of law and also an indefensible breach of the equality principle which is a basic feature of the Constitution.

They are also in open violation of the judgments of this Court which are binding under Article 141 and the fundamental concept of separation of powers which has also been held to be a basic feature of the Constitution...’

The hypocrisy and opportunism that underlay the actions compelled the court to observe:

This attitude and action of the state of Kerala has unfortunately resulted in allowing the ‘creamy layer’ among the backward classes in the state of Kerala to continue to grab the posts in the services in government, public sector, etc., even after *Indra Sawhney*, and get away with the same. The result is that the really backward among the backward classes have been deliberately deprived by the state of their legitimate right to these posts which would have otherwise obviously gone to them. To us it appears rather anomalous that while the governments declare endlessly that they will see to it that benefits of reservations really reach the needy among the backwards, the very action of the governments both on the Executive side and on the legislative side, deliberately refusing to exclude the creamy layer and in indiscriminately including more castes in the backward classes list are leading to a serious erosion of the reservation programme.

The attitude of the Kerala government and legislature revealed much about their priorities. The court observed:

...the state of Kerala did not care if its Chief Secretary was to go behind bars. It did not care if the real backwards were left in the lurch. It then took to legislation inasmuch as it would then be difficult for this Court to hold the legislature in contempt. It is difficult for us to think that the Kerala Government really believed in the validity of its legislation. It appears to us that it thought better to leave it to the courts to strike down the Act. Years would roll by and in the interregnum the creamy layer could continue to reap the benefits of reservation.

This was a problem that transcends the particular case, and even the particular government and legislature. The court observed:

Unfortunately today, as a matter of political expediency, governments tend to knowingly violate the Rule of Law and the Constitution and pass on the buck to the courts to strike down the unconstitutional provisions. It would then become easy for the government to blame the courts for striking down the unconstitutional provisions. The case on hand is a typical illustration of such an attitude.²³

As stinging a rebuke, and as explicit a description of where opportunist, vote-bank politics has landed the country. But I am on the general pattern, and on the responsibility for it. A heap of examples can be given of the executive disregarding orders of the Supreme Court, and no one being any

the worse off for doing so. For seats in educational institutions, for posts in government service to be reserved for some group, the Supreme Court has held time and again, the group must not only be one that is in need of special measures because it is disadvantaged economically and socially, it must in the first instance be a homogeneous class. Thus, for instance, we may conclude that the 'rural population' is socially and economically handicapped, but, as we have seen, the court struck down the decision of UP to reserve seats for the population of 'rural areas' on the ground that 80 per cent of the population of the state cannot be a homogeneous class.²⁴ On this reasoning, the Supreme Court has repeatedly held, and unambiguously, that place of birth cannot be the basis for reservations, and it has passed detailed orders to this effect in several cases. And yet, in *Saurabh Chaudri*, it was constrained to note, 'It is neither in doubt nor in dispute that before the scheme was evolved in *Dr Pradeep Jain's* case, notices had been issued to all the States and all of them were fully heard. But despite the same, the orders passed by this Court in *Dr Pradeep Jain's* case had been flouted with impunity, *inter alia*, by the states of Assam, Karnataka, Goa and Tamil Nadu. Now it transpires that even the state of Punjab has also not been following the said decision...' ²⁵ And yet an incomplete statement. For in such instances, the executive dragged its feet, the legislature passed a law of convenience. But, as we have seen, *in the end, the court too did not set an example by actually punishing anyone*. And that is typical, especially in cases where changes have been clothed in the garb of 'social justice' and the like. The judiciary as much as any other group has been nervous, defensive lest someone label it conservative.

Both feature – that a distressingly large proportion of cases in this field has come before the Supreme Court because the governments have deliberately not adhered to the decisions of the court, and that the overwhelming proportion of amendments of the Constitution in regard to reservations has been enacted to overturn the law as laid down by the Supreme Court – call for reflection:

- How is it that governments feel they can get away with flouting the court's orders 'with impunity'? In particular, does the court encourage this kind of cavalier conduct by its lenience?

- When, as we noted earlier, the Supreme Court strikes down a measure on the ground that it violates the basic structure of the Constitution, does the measure cease to do so because Parliament has amended some article? Who is to settle what is the basic structure? The Supreme Court or some evanescent majority in Parliament?

The juggernaut

50 per cent: origin of the figure, its fate, consequences of its fate...

What is conceded once to appease an aggressive group, to pander to a vote bank, just cannot be taken back. It becomes the test of fidelity to the ‘cause’ – anyone who even suggests that there is a better way to help the very persons in whose name the concessions have been made is pounced upon as ‘Anti-Dalit’, ‘Anti-poor’... Society gets polarized, politics whirls, power gets congealed along those chasms. Far from being able to step back, what has been conceded in one round becomes the floor for the next.

The Constitution as it was adopted provided that seats would be reserved in legislatures for Scheduled Castes and Scheduled Tribes for ten years. That period expired in 1960. Forty-five years after that date passed, who dare today advocate that there be no reservations after some particular date howsoever distant in the future?

Each concession, once made, just goes on swelling. Once a dilution or compromise is agreed to, it paves the way for, indeed it becomes the justification for the next, greater dilution: ‘But there is nothing new in this,’ the argument runs, ‘the *principle* was agreed to years ago.’

Articles 15 (4) – ‘Nothing in this Article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes’ – and 16(4) – ‘Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented

in the services under the State’ – are, as their language plainly indicates, *enabling* provisions. In fact, they have become *mandatory* provisions.

The twin objectives of Articles 15 and 16 were to provide adequate protection to the disadvantaged on the one hand and, through special measures, raise their capabilities so that they would on their own compete with the rest. The duty to provide *adequate protection* became the duty to give *preferential treatment*.

The duty to give preferential treatment has become the duty to *meet overriding claims* as a first charge. Article 335, Justice V.R. Krishna Iyer reminds us, speaks of ‘*claims* of Scheduled Castes and Scheduled Tribes to services and posts’ and directs that “The *claims* of Scheduled Castes and Scheduled Tribes *shall* be taken into consideration, consistently with the maintenance of efficiency of administration....’ ‘This provision,’ he declares, ‘directs pointedly to the *claims* of – not compassion towards *harijans* to be given special consideration in the making of appointments in the public services....’¹ Justice A.C. Gupta correctly points out in the same judgment that Article 335 does not enlarge the claim, that in fact the provision *qualifies* it! As he says:

This Article does not create any right in the members of the Scheduled Castes and the Scheduled Tribes which they might claim in the matter of appointments to services and posts; one has to look elsewhere, Article 16(4) for instance, to find out the claims conceded to them. Article 335 says that such claims shall be considered consistently with administrative efficiency; this is a provision which does not enlarge but qualify such claims as they may have as members of the Scheduled Castes and Scheduled Tribes...²

But how can words slow down the zealous? Claim it is. And soon, claim not just at the appointments stage but also in promotions. And just a little later, claim not just of the Scheduled Castes and Tribes but also of those who are not mentioned in the article – Other Backward Classes! The Scheduled Castes and Tribes, the OBCs ‘need aid,’ Justice O. Chinnappa Reddy declaims, ‘they need facility; they need launching; they need propulsion. Their *needs* are their *demands*. The demands are *matters of right* and not of philanthropy. They ask for parity, and not charity.’³

Ambedkar’s figure, and what has happened since then

Similarly, take the question of the proportion of seats that may be reserved. In his speech in the Constituent Assembly on the provision that then dealt with reservations, Article 10 of the draft Constitution, Dr B.R. Ambedkar himself cautioned against an exception to the fundamental rule of equality becoming so large as to ‘eat up the rule altogether’. ‘Let me give an illustration,’ he said. ‘Supposing, for instance, reservations were made for a community or a collection of communities, the total of which came to something like 70 per cent of the total posts under the State and only 30 per cent are retained as the unreserved. Could anybody say that the reservation of 30 per cent as open to general competition would be satisfactory from the point of view of giving effect to the first principle, namely, that there shall be equality of opportunity? It cannot be in my judgment. Therefore, the seats to be reserved, if the reservation is to be consistent with sub-clause (1) of Article 10, must be confined to a minority of seats. It is only then that the first principle could find its place in the Constitution and [be] effective in operation....’⁴ And yet, in the wake of *Indra Sawhney*, states that have reserved 69 per cent of seat – almost exactly the proportion mentioned by Ambedkar to emphasize how the rule of equality would be swallowed by the exception, recall his illustration, ‘Supposing, for instance, reservations were made... the total of which came to something like 70 per cent of the total posts under the State....’ – have been specifically allowed to retain the 69 per cent reservations.

In *M.R. Balaji*, speaking, as it said, ‘generally and in a broad way’, the Supreme Court said, ‘a special provision should be less than 50 per cent; how much less than 50 per cent would depend upon the relevant prevailing circumstances in each case.’⁵

*From ‘less than’ to ‘a minimum of to
‘of total positions in the service’ to...*

Notice, first of all, that in *M.R. Balaji*, the Supreme Court was dealing with what may be done in educational institutions, *not* with what is to be done while running a governmental service or structure. Yet that judgment became the mandate for ‘50 per cent in services of the State’.

Furthermore, notice that even in regard to educational institutions, the court said that ‘a special provision should be *less than 50 per cent*.’

That ‘less than 50 per cent’, has become, by steps that we shall encounter, not just ‘50 per cent’, it has become a *mandatory* 50 per cent, 50 per cent in recruitment in a service, that is.

That mandatory 50 per cent in *recruitment* has become a mandatory 50 per cent *in the total positions in a service*. So that, when the per cent reserved in *recruitment* during a particular year has been less than 50 per cent of *the total strength of the service*, that excess has been upheld. Thus in *N.M. Thomas*, thirty-four of the total fifty-one promotions were reserved – that is, 68 per cent of the positions at the next level – were to be assigned by birth. And they were reserved by a device which has cast a long shadow as we shall soon see. As few were qualified to meet even the meager norm which had been set for these reserved posts, the standard was diluted in that the persons were allowed to acquire those minimal proficiencies in a longer time than had been originally prescribed. The judge had no difficulty: “The promotions made in the service as a whole are nowhere near 50 per cent of *the total number of posts...*’ Hence, he said, the order reserving this proportion of posts by relaxing the standards was not just fulfilling the (legally non-enforceable) Directive Principle of Article 46 – ‘The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation’ – but is in fact ‘meant to implement... the direction under Article 335’ – the direction, namely, that the state shall take account of the claims of members of the Scheduled Castes and Tribes ‘consistently with the maintenance of efficiency of administration’!⁶

The ‘mandatory 50 per cent in *the total positions* in a service’ has become a mandatory 50 per cent at *all levels* in a service. Hence, reservations in promotions have become the order of the day.

In *N.M. Thomas*, judges rationalized their approval for reservations in promotions by diluting the minimum qualifications that had been prescribed on the ground that actually the minimum standards were not being diluted, all that was happening was that members of a particular class – the Scheduled Castes and Tribes – were being given a little more time to come up to them: of course, they did not press the point that this extension was the latest in a series of extensions, the time limit having been extended

again and again, earlier, in 1958, then in 1972, then in 1974! Since then, the case has become the scripture for relaxing not just the time within which prescribed qualifications must be acquired but for relaxing the qualifications themselves! The '*principle*' of relaxation has already been accepted by this court, the succeeding batches of progressive judges have declared.

*From 'candidates must come up to the standard'
to 'the standard must come down to the candidates'*

In *N.M. Thomas* the judges gave another reason. They asserted that the qualifications that had been laid down were not really all that vital for fulfilling the mandate of Article 335 – namely, that of maintaining the efficiency of administration.⁷ If that was so, why the standards had been prescribed at all, of course, was not something on which the judges would expend their time. The '*principle*' of relaxation having been accepted, relaxations of standards in regard to skills which were manifestly necessary for the tasks that had to be performed has become, as we shall soon see, the order of the day, and have been upheld by the courts.

Having just declared,

We must expect that Government will, while fixing the longer grace time for passing tests, have regard to administrative efficiency. You can't throw to the winds considerations of administrative capability and grind the wheels of Government to a halt in the name of *harijan* welfare'. The administration runs for good government, not to give jobs to *harijans*...⁸

Justice V.R. Krishna Iyer pointed out that these are just clerical posts, and scoffed:

We need not tarry to consider whether Article 16 applies to appointments on promotion. It does. Nor need we worry about administrative calamities if test qualifications are not acquired *for a time* [Italics in the original] by some hands. For one thing, these tests are not so telling on efficiency as explained by me earlier. And, after all, we are dealing with clerical posts in the Registration Department where alert quill-driving and a smattering of special knowledge will make for smoother turnout of duties. And the Government is only postponing, not foregoing, test qualification...⁹

Justice K.K Mathew was, of course, even more revolutionary. As in his reading the object of that enabling provision, Article 16(4) of the Constitution, is the mandatory one to ensure that those who are inadequately represented get to be adequately represented, he could not be bothered by so trifling a thing as relaxation of standards. He declared, ‘The State can adopt *any measure* which would ensure the adequate representation in public service of the members of the Scheduled Castes and Scheduled Tribes and justify it as a compensatory measure to ensure equality of opportunity provided it does not dispense with the acquisition of the basic minimum qualification necessary for efficiency of administration...’ And government can extend that ‘any measure’ to Scheduled Castes and Tribes and confine it to them, or it can extend it to OBCs or to all of the three, he said. “The law-maker should have the liberty to strike the evil where it is felt most.’

He went further and called into question the notion of standards itself. He said that the standards must be so devised that they do not lead to ‘exclusion on grounds other than those appropriate or rational for the good (posts) in question’, and in the very next sentence declared that even this is not enough. To recall his words, “The notion requires not merely that there should be no exclusion from access on grounds other than those appropriate or rational for the good in question, *but the grounds considered appropriate for the good should be such that people from all sections of society have an equal chance of satisfying them!*’¹⁰ In a word, now, if he is from a caste that is not adequately represented in the services of the state, it is not the candidate who is to be judged by the standard that has been prescribed. *That standard* has to be judged by whether it enables or prevents members of that caste from making it into the services! And not just by whether it enables persons from that caste to make it to the services but by whether it enables them to get promoted in them from one level to the next.

Notice that in all this Justice Mathew equates ‘the good’ in question with not an efficient system of governance but with the *posts* that are available. Actions of the entire state must be informed and illuminated by this approach, he says, and as, under Article 12, the judiciary is a part of ‘the State’, it also must be guided by this approach.¹¹

What has been taken forward in each round is the ‘principle’ which has been upheld by the Supreme Court in the preceding round. The court has upheld the ‘*principle*’ of relaxing standards, so standards can be relaxed to any extent – even to the extent, as we shall soon see, of being waived altogether. The court has upheld the ‘*principle*’ of reservations in promotions in the clerical service, so reservations in promotions in all services are valid. The court has accepted the ‘*principle*’ of reservations in promotions, so reservations in promotions to the highest levels in all services are valid...

Permission to relax the minimum standards has become a mandate to grant preference: ‘If members of Scheduled Castes and Scheduled Tribes, who are said by this Court to be backward classes, can maintain minimum necessary requirements of administrative efficiency, *not only representation but also preference may be given to them to enforce equality and to eliminate inequality...* The basic concept of equality is equality of opportunity for appointment. *Preferential treatment* for members of backward classes with due regard to administrative efficiency alone can mean equality of opportunity for all citizens....’¹² Apart from noticing the way ‘the principle’ is being stretched – from ‘permission to relax’ to giving preference – notice the switch from ‘Scheduled Castes and Scheduled Tribes’ to the much more expandable ‘backward classes’.

And what is necessary for ensuring efficiency of administration has by now been made to stand on its head. It used to be that to ensure efficient administration, the State must assign the job to ‘*those who are best qualified to do it*’. This became, ‘those who have *the minimum qualifications to do it*’. This became, ‘those who have *the potential to acquire* the minimum qualifications in *the specified period*’. This became, ‘those who have the potential to acquire the minimum qualifications in the course of the period *as extended*’. This became, ‘those who have the potential to acquire the minimum qualifications in the course of the period *as extended from time to time*’. This has by now become, ‘those who have entered the service through reservations, or have been promoted against the reserved quota must be *presumed to have the necessary qualifications*’, and furthermore that ‘he who raises a doubt about any of them must establish that *he* is not actuated by anti-SC/ST/OBC bias.’ And *that*, as we shall soon

see, has been carried further by the proposition that ‘efficiency of administration’ does not mean what it has been taken to mean!

From that it has been but a tiny step to dismissing anyone who questions what is being done with a pejorative query: ‘How can any member of the so-called forward communities complain of a compensatory measure made by Government to ensure the members of Scheduled Castes and Scheduled Tribes their due share of representation in public services?’, the reader is asked to explain in *N.M. Thomas*.¹³

And, as we shall soon see, it is an even shorter hop from that pejorative wonderment to the charge of downright prejudice, indeed of conspiracy to perpetuate dominance over, and exploitation of the poor.

‘Less than 50 per cent’, or ‘A minimum of 50 per cent’, or...

The proviso of Article 15(4) to the fundamental right to equality, the Supreme Court said in *M.R. Balaji*, has been provided because the interests of society as a whole will be better served if special measures are taken to lift the socially and educationally backward classes. But the exception cannot be allowed to swallow the rule. It recalled what the University Education Commission had stated that the interests of the country as a whole would be gravely jeopardized if standards were allowed to be lowered; that accordingly reservations in educational institutions ought to be limited to one-third; and that they should be adopted for only ten years.

The court recalled how the chairman of the Backward Classes Commission, even as he forwarded the report of the Commission, had expressed the gravest doubts about the remedy – reservations based in effect on caste – that was being recommended. He had written that this would, on the one hand, perpetuate the caste system and, on the other, exclude persons from religions other than Hinduism who were equally deprived but whose religions had ostensibly done away with caste. His eyes had been opened as he reflected upon the consequences of the proposals, he wrote; this had given him ‘a rude shock’ and had driven him to conclude that ‘the remedies suggested by the Commission were worse than the evil it was out to combat.’

The court recalled that the report of the Commission had been deliberated upon by the Central government – all this was in the mid-1950s,

remember, when Pandit Nehru was at the zenith, the very same Pandit Nehru whose every word we are otherwise asked to laud and follow. 'The Memorandum issued by the Government of India on the Report of the Commission points out that it cannot be denied that the caste system is the greatest hindrance in the way of our progress towards an egalitarian society, and the recognition of the specified castes as backward may serve to maintain and even perpetuate the existing distinctions on the basis of castes,' the Supreme Court pointed out. The government's memorandum also found fault with the criteria that had been used by the Commission for identifying those who had to be helped.¹⁴

The Central government had then written to the Government of Mysore on the subject of reservation of seats under Article 15(4). In this communication, the Central government had pointed out that the All India Council for Technical Education had recommended that the reservation for Scheduled Castes and Scheduled Tribes and other backward communities may be up to 25 per cent with marginal adjustments not exceeding 10 per cent in exceptional cases. The Central government had, therefore, suggested that in all non-government institutions in the state, the reservations under Article 15(4) should not in any case exceed 35 per cent.¹⁵ In fact, the Supreme Court observed, 'In this particular case it is remarkable that when the State issued its order on 10 – 7 – 1961, it emphatically expressed its opinion that the reservation of 68 per cent recommended by the Nagan Gowda Committee would not be in the larger interests of the state. What happened between 10 – 7-1961, and 31 – 7-1962, does not appear on the record. But the state changed its mind and adopted the recommendation of the Committee ignoring its earlier decision that the said recommendation was contrary to the larger interests of the state....' After a detailed consideration of the constitutional provisions as well as of the evolution of government orders and the reports of various committees, the Supreme Court struck down the 68 per cent reservation as 'plainly inconsistent with Article 15(4)....'

That is how it came to observe, 'Speaking generally and in a broad way, a special provision should be less than 50 per cent; how much less than 50 per cent would depend on the relevant prevailing circumstances in each case...'¹⁶ And the court emphasized that what applied to Article 15(4)

applied with equal rigour to Article 16(4) as the two were part of the same scheme – that of enabling the state to institute special measures to lift the backward classes.

Today everyone takes it as axiomatic that 50 per cent has to be set apart in services on the basis of birth, as if it is something which has been not just sanctioned but sanctified by the courts, if not the Constitution itself.

As we have just seen, the case in which the figure originated had nothing to do with reservations in services. And even in that case the figure was put out not as the result of an analysis of what the profession required or of what would be fair and just. It came in as a remark to illustrate the proposition that an exception to a rule cannot be so large as to swallow the rule itself.

Recall that Article 15(1) of the Constitution forbids any discrimination on grounds of religion, race, caste, sex, place of birth. Article 15(4) says that notwithstanding this general rule, the state may make ‘any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes’.

Mysore had already reserved 15 per cent of the seats in medical and engineering colleges and other technical institutes for the Scheduled Castes, and 3 per cent for the Scheduled Tribes. It passed a new order reserving another 50 per cent for Most Backward Castes. That meant that the *exception* – that is, reservations under Article 15(4) – became larger than the rule – the prohibition, that is, in Article 15(1) against discrimination on grounds of caste, etc.

It is in illustrating this matter that the Supreme Court talked of 50 per cent. It did so illustratively, tentatively, ‘speaking generally and in a broad way’, as it said.

The language itself shows that the court was merely illustrating the arithmetical point. Its view of what was being sought to be done was stern:

Therefore, what is true in regard to Article 15(4) is equally true in regard to Article 16(4)... that the Constitution-makers assumed... that while making adequate reservation under Article 16(4), *care would be taken not to provide for unreasonable, excessive or extravagant reservation, for that would, by eliminating general competition in a large field and by creating widespread dissatisfaction amongst the employees, materially affect efficiency.* Therefore, like the special provision improperly made under Article 15(4), reservation made under Article 16(4) beyond the permissible and legitimate limits would be liable to be challenged as fraud on the Constitution.

But that arithmetical illustration became the norm. The very words, ‘speaking generally and in a broad way’ came to be used to assert that even 50 per cent need not be the limit as the court had not specified any hard and fast rule.

At first the ceiling.

That becomes the floor.

That floor becomes a right.

That right having already been secured becomes the base from which to wrest more.

That it has been wrested in educational institutions becomes the rationale for demanding, and soon getting it in services...

A word is inserted

The orders under challenge had raised reservations in promotions to 66 2/3 per cent of the vacancies.¹⁷ This was well over the 50 per cent that had been accepted and applied by the Supreme Court since *Balaji*. Justice Krishna Iyer now held that, in any given year reservations should not be ‘*substantially* more than 50 per cent of the promotional posts’, and that as the reservations decreed by the Railways and to be carried forward – 66 2/3 per cent! – shall not be ‘*considerably* in excess of 50 per cent’, they were constitutional!¹⁸

Justice Krishna Iyer’s justification was twofold. For one thing, he maintained, as the earlier prescriptions and limits had not got the Scheduled Castes and Tribes their due share in state power, more had to be done – by not taking too rigid a view of any upper limit, by further diluting what was being asked of these sections by way of qualifying standards, etc. ‘Law is what law does,’ he said. The ‘reluctant relaxation’ of standards in the earlier order had not worked. ‘Constant monitoring of law-in-action, with an eye on the end result is social engineering.’ As the earlier relaxations and reservations had not secured the desired ‘end result’, higher reservations and further relaxations are justified.

Second, he maintained, the word should really be ‘asserted’, that the higher reservations, the even greater relaxations, the carry forward for three years even in promotions ‘would not materially affect the stream of ‘merit-worthy’ candidates, nor substantially diminish the prospects of non-SC &

ST candidates in a given year.’¹⁹ In his concurring judgment, Justice Chinnappa Reddy was even more dismissive:

Every lawful method is permissible to secure the due representation of the Scheduled Castes and Scheduled Tribes in the Public Services. There is no fixed ceiling to reservation or preferential treatment in favour of the Scheduled Castes and Scheduled Tribes though generally reservation may not *be far in excess of* fifty per cent. There is no rigidity about the fifty per cent rule which is only a convenient guideline laid down by Judges. Every case must be decided with reference to the present practical results yielded by the application of the particular rule of preferential treatment and not with reference to hypothetical results which the application of the rule may yield in the future...²⁰

And in support, he cited what the Supreme Court had held in *State of Punjab v. Hira Lal*. In that case, the Punjab High Court had pointed to the anomalies that would arise as juniors jumped over their senior – not because of merit but by virtue of having been born to one set of parents rather than another – and the consequential demoralization that would set in. The Supreme Court had reversed the high court’s verdict, saying:

The extent of reservation to be made is primarily a matter for the State to decide. By this we do not mean to say that the decision of the State is not open to judicial review. The reservation must be only for the purpose of giving adequate representation in the service to the Scheduled Castes, Scheduled Tribes and Backward Classes... The mere fact that the reservation made may give extensive benefits to some of the persons who have the benefit of the reservation does not by itself make the reservation bad. *The length of the leap to be provided depends upon the gap to be covered.*

* * *

There was no material before the High Court and there is no material before us from which we can conclude that the impugned order is violative of Article 16(1). Reservation of appointments under Article 16(4) cannot be struck down on hypothetical grounds or on imaginary possibilities. He who assails the reservation under that article must satisfactorily establish that there has been a violation of Article 16(1).²¹

In the event, *Hira Lal* has been over ruled in *Indra Sawhney*!

Another avenue

Soon, the court was confronted with another way of getting around the 50 per cent limit. This was the ‘carry forward rule’, to which we have just seen references. Assume that this year 50 per cent seats had been reserved, but that only 30 per cent could be filled as the remaining candidates, even after the relaxation of minimum standards, just could not be found. The position was taken that these unfilled 20 per cent must be ‘carried forward’ to the next year. The result was that next year, not 50 per cent but 70 per cent seats would be reserved. If again only 60 per cent of these could be filled in that year, in the third year, 80 per cent seats would get reserved, and so on.

And remember that governments now, specially before each bout of elections, go in for ‘special recruitment drives’ in which only persons from the reservation-castes can apply. So, there is the effect of 50 per cent reservation; plus of what has been carried forward from previous years; plus of the ‘special recruitment drive’; plus of the ruling that those members of these castes who qualify on merit, even though they have availed of relaxations like those relating to age, qualifying marks, etc., shall be counted not in the 50 per cent reservation quota but in the general category.

The compound effect can scarcely be believed. In October-November 2005, the Rajasthan government decided to recruit 33,000 teachers for primary schools. Affidavits filed in the high court and Supreme Court indicate that of the 33,000 posts, *only 1,900 were* filled by candidates from castes that have not secured reservations! Even government sources do not put the figure higher than 6,000 or so.

The ‘carry forward’ device was challenged. In *Devadasan*, the Supreme Court decisively struck down the carry forward rule as unconstitutional, and held that the 50 per cent ceiling would apply to the carry forward rule also, that each year would have to be considered by itself. Article 15(4) is an exception to Article 15(1) and cannot be allowed to swallow the rule.²²

Justice K. Subba Rao dissented. Equality of opportunity can be ensured only if special advantages are given to the downtrodden or real handicaps are put on the better off, he reasoned. Articles 15(4) and 16(4) are *not* exceptions. On the contrary, they confer a power untrammelled by the main provisions in each case. The Article – 335 – that prescribes that the requirements of efficient administration have to be kept in mind while helping SCs and STs, he declared, has nothing to do with Article 16(4). The

state can make ‘any provision for reservations or posts’ – there is no a priori limit. Individuals from higher castes will inevitably be put to hardship, he said; but this is inherent in the scheme of reservations... Standards will be adversely affected, he acknowledged, but this too is inherent in the scheme of reservations. How much deterioration in standards the state is prepared to countenance will be contained in the minimum qualifications it lays down. The very words that the court had used in *Balaji*, he maintained, ‘speaking generally’, ‘broadly’ showed that all it was doing was suggesting a ‘workable guide’ and that it was not laying down ‘an inflexible rule of law’.²³

No time for caution

The matter continued to go in and out of courts. Some judges continued to caution against the enthusiasm that was coming to sway the court. They continued to draw attention to the twin dangers that would inevitably follow once the scheme of the Constitution was stretched in the way it was being stretched – that the fundamental guarantee to equality would be rendered a nullity, that governance would be seriously impaired and, soon enough, this deterioration would injure the downtrodden as much as anyone else. Thus, to take just one example, Justice A.P. Sen pointed out in *Vasanth Kumar*, that the state must pay heed to both objectives of the Constitution, namely, efficiency of administration and equality for all persons. The Preamble ‘shows the nation’s resolve to secure *to all its citizens*: Justice – social, economic, political...’, italicizing the words ‘to all its citizens’. He warned, ‘The State’s objective of bringing about and maintaining social justice must be achieved reasonably having regard to the interests of all. Irrational and unreasonable moves by the State will slowly but surely tear apart the fabric of society. It is primarily the duty and function of the State to inject moderation into the decisions taken under Article 15(4) and 16(4), because justice lives in the hearts of men and a growing sense of injustice and reverse discrimination, fuelled by unwise State action, will destroy, not advance, social justice. If the State contravenes the constitutional mandates of Article 16(1) and Article 335, this Court will, of course, have to perform its duty.’ The Constitution does not contemplate that representation of a class in governmental services shall exactly correspond to its share in the

population, it aims just at securing adequate representation, he emphasized.²⁴

In full swing

But by now progressives were in full swing. Reservations under Articles 15(4) and 16(4) are for classes that are inadequately represented, Justice O. Chinnappa Reddy began. The purpose of these articles is to secure adequate representation. The percentage that is permissible is, therefore, to be determined by reference to the extent of that inadequacy. ‘Naturally, if the lost ground is to be gained, the extent of reservation may even have to be slightly higher than the percentage of population of the backward classes,’ he declared. Whether the limit should be 40 per cent, 50 per cent or 60 per cent, he said, ‘is a matter for experts in management and administration’.

The real import of that observation was manifest in the next sentence! As such, for the court to lay down a limit would be ‘arbitrary’, the judge said, ‘and the Constitution does not permit us to be arbitrary’ In *Balaji* itself the court had been circumspect, he said. It had been careful to say that in indicating the limit of 50 per cent, it was ‘speaking generally and in a broad way’. Therefore, Justice Chinnappa Reddy maintained, ‘We are not prepared to read *Balaji* as arbitrarily laying down 50% as the outer limit of reservation.’

Notice how he comes to that word, ‘arbitrarily’: laying down a limit would be ‘arbitrary’, he says; the Constitution does not permit us to be arbitrary; hence, if the Supreme Court in *Balaji* laid down a limit, which it did not, then it would have been ‘arbitrary’ in doing so! Hence, there is no limit!

‘We must say here what we have said earlier, that there is no scientific statistical data or evidence of expert administrators who have made any study of the problem to support the opinion that reservation in excess of 50% may impair efficiency...,’ he said, having in the paragraph immediately preceding this one relied on that leftist oracle, *Monthly Review* – no doubt ‘scientific statistical data or evidence’! He did magnanimously add though, ‘Our observations are not intended to show the door to genuine efficiency. Efficiency must be a guiding factor but not a smoke screen...’²⁵ Given his mode of reasoning, and his penchant for pasting motives and pejoratives on

anyone who did not buy into his brand of progressivism, we can be certain that anyone who demurred at what he was prescribing would have been held guilty of using efficiency as a smokescreen, and worse.

In *N.M. Thomas*, Justice Fazal Ali went a step further. 'As to what would be a suitable reservation within permissible limits will depend upon the facts and circumstances of each case and no hard and fast rule can be laid down, nor can this matter be reduced to a mathematical formula so as to be adhered to in all cases,' he said. 'Decided cases of this Court have no doubt laid down that the percentage of reservation should not exceed 50 per cent. As I read the authorities, this is, however, a rule of caution and does not exhaust all categories. Suppose for instance a State has a large number of backward classes of citizens which constitute 80 per cent of the population and the Government, in order to give them proper representation, reserves 80 per cent of the jobs for them, can it be said that the percentage of reservation is bad and violates the permissible limits of clause (4) of Article 16? The answer must necessarily be in the negative. The dominant object of this provision is to take steps to make inadequate representation adequate.'²⁶ So, 80 per cent it could be!

Incidentally, in *Indra Sawhney*, Justice R.M. Sahai punctures the assertion of Justice Fazal Ali, and the 'reasoning' of Justice Mathew with a pinprick! He points to the bare words of Article 16(4): had the framers intended that reservations should be proportionate to the share of a group in the country's population, they could easily have ensured that by adding four brief words, 'in proportion to it,' in the article. Furthermore, he draws attention to the inspiration of Justice Mathew's proposition of 'proportional equality': 'In *Thomas Mathew, J*, introduced the concept of proportional equality from two American decisions *Griffin* and *Harper*. None of the decisions were concerned with affirmative action. The one related to payment of charges for translation of manuscript in appeal and other with levy of poll tax at uniform rate indiscriminately. In view of clear phraseology and the background of enactment of Article 16(4) any interpretation of it on the ratio of American decisions cannot be of any help. Our Constitution does not approve of proportional representation either in services or even in Parliament as is illustrated by Article 331 of the Constitution which empowers the President to nominate not more than two

members of the Anglo-Indian community to the House of the People, irrespective of their population, if they are not adequately represented...'²⁷ We need only add that such suborning of any decision or passage that will come in handy from foreign courts, in this case American courts, is standard practice, as is the denunciation of reliance on foreign cases when *that* better serves the cause!

But to proceed with the progressives: Justice Krishna Iyer added his weight to the proposition, saying, 'I agree with my learned Brother Fazal Ali, J., in the view that the arithmetical limit of 50 per cent in any one year set by some earlier rulings cannot perhaps be pressed too far. Overall representation in a department does not depend on recruitment in a particular year, but the total strength of a cadre. I agree with his construction of Article 16(4) and his view about the "carry forward" rule.'²⁸

The 50 per cent limit again became a matter of great contention in subsequent cases, and it seemed for a while that the breaches that these few judges had made in the dyke would lead the court to break it completely. Fortunately that did not happen. After giving an exhaustive summary of what had been held by the Supreme Court in different judgments, and by what different judges had held in *N.M. Thomas*, Justice E.S. Venkataramiah observed in *K.C. Vasanth Kumar*, 'After carefully going through all the seven opinions in the above case, it is difficult to hold that the settled view of this Court that the reservation under Article 15(4) or Article 16(4) could not be more than 50 per cent has been unsettled by a majority on the Bench which decided this case.' He did not pursue the point on the ground that 'if reservation is made only in favour of those backward castes or classes which are comparable to the Scheduled Castes and Scheduled Tribes, it may not exceed 50 per cent (including 18 per cent reserved for the Scheduled Castes and Scheduled Tribes and 15 per cent reserved for "special group") in view of the total population of such backward classes in the State of Karnataka' – a point to which we shall have occasion to return.²⁹

But *Vasanth Kumar* was just an advisory opinion, it came to be asserted. And the progressives had not abandoned the point.

First off, the Supreme Court has accepted the proposition that if any candidate belonging to the castes for which reservations have been made qualifies on merit, he shall *not* be taken to belong to the reserved category.

He will be treated as an ‘open competition candidate’, and to that extent the proportion of persons from that caste who will get in will be higher than the proportion of seats that have been reserved.³⁰

Justice Ratnavel Pandian will have none of this mealy-mouthed revolution. He rejects the proposition wholesale that reservations must not exceed 50 per cent on the ground that the observation to this effect in cases such as *Balaji* is just obiter dicta. He allows only that reservations should not be 100 per cent! ‘As to what extent the proportion of reservation will be so excessive as to render it bad,’ Justice Pandian holds, ‘must depend upon adequacy of representation in a given case. Therefore, the decisions fixing the percentage of reservation only up to the maximum of 50% are unsustainable. The percentage of reservation at the maximum of 50% is neither based on scientific data nor on any established and agreed formula. In fact, Article 16(4) itself does not limit the power of the Government in making the reservation to any maximum percentage; but it depends upon the quantum of adequate representation required in the Services.’³¹

Justice Sawant heads in the same direction, but slows down a bit at the penultimate moment! He recalls Justice Hegde’s observation in *Hira Lal*: the length of the leap to be provided, Justice Hegde had said, depends upon the gap that is to be covered. Backwards constitute 77 1/2 per cent of the population, Justice Sawant notes, but adds that even during the Constituent Assembly debates no one suggested that reservations must be in proportion to the share of a group in the population.³²

‘Adequate representation’ for certain castes,

or for those among them who are by definition not qualified?

A typical twist was soon added to the ‘50 per cent rule. Recall the objective that is embedded in Article 16(4): the article permits the state to reserve posts for a backward class of citizens ‘which, in the opinion of the State, *is not adequately represented in the services under the State*’.

The Punjab government had instituted 22 per cent reservation for members of Scheduled Castes and Tribes and Backward Classes in a service. The cadre strength was of 202 posts. In accordance with the 22 per cent reservation, members of Scheduled Castes were entitled to forty-two

posts. There were already forty-seven Scheduled Caste members in the category in question. Reasoning that ten of these had been promoted on seniority-cum-merit, the government decided that SCs were represented in the service not to the extent of 47 posts against the entitlement of forty-two posts, but only thirty-seven posts. Accordingly, it promoted another lot. The promotions were struck down in *Joginder Singh Sethi v. Government of Punjab*.³³ The judgment was in turn struck down in appeal – first by the Punjab and Haryana High Court, and then by the Supreme Court.

The matter came up again before the Supreme Court in *R.K. Sabharwal*. The court held that those who get into the service (or, when the matter concerns promotions to a grade, get promoted) on the basis of seniority-cum-merit shall *not* be counted while determining the extent to which a reserved quota has been filled. They will be counted in the general category. The court gave two reasons for the ruling.

First, it said, Article 16(4) allows the State to make ‘any provision’ for reservations for classes that are not adequately represented in its services. Hence, if the state makes a provision to the effect that those who make it on seniority-cum-merit shall not be counted against the reserved quota, that is it. Second, it said, the fact that the castes or classes for which reservations have been instituted already account for more than the proportion reserved for them, ‘may be a relevant factor for the state government to review the question of continuing reservation for the said class but so long as the instructions/rules providing certain percentage of reservations for the backward classes are operative, the same have to be followed.’³⁴

The result has been predictable. And we shall soon catch glimpses of it.

The point bears reflection. Recall once again what the objective of Article 16(4) is: it is to enable the state to institute reservations for the backward classes that are not adequately represented in the services under the state. Assume that caste ‘X’ – ‘class X’, if you want to stick to the fiction – is not adequately represented in a service under the state. The state decrees that ‘Y’ per cent of the posts in the service – or, in the case of promotions, ‘Y’ per cent of the posts at that particular level in the service – shall be reserved for caste ‘X’. Assume that individuals ‘Z-1’ to ‘Z-20’ belong to that caste. If they make it into the service or to that higher grade because they are senior enough or because they are found to have the

requisite merit, do they cease being members of caste 'X'? Certainly not if we go by what the progressive judges have been asserting: haven't they been insisting that no one can change his caste? This being the 'reality', when the government is ascertaining whether caste 'X' is 'adequately represented' in the service (or at that higher level of the service) or not, by what logic are they to be excluded from caste 'X'?

Is the quota for that caste/class? Or for *those members of that caste/class who do not have the qualifications required for the service or the post?*

By the grace of the Supreme Court in *R.K. Sabharwal*, the objective of Article 16(4) is no longer that a specified caste or class shall be adequately represented in the service. The objective is that *those members of this caste or class who cannot make it on their own shall be adequately represented!*

Notice also, the dissonance with what is the law in related contexts. How is the 'carry forward' rule justified? Vacancies that could not be filled for want of a sufficient number of candidates are to be 'carried forward' to subsequent years on the ground that the extent of representation that is to be counted is not in vacancies that arise in a single year, but the extent of representation *in the cadre as a whole*. In the case at hand, by contrast, the court has held that it shall *not* look at the extent of representation in the cadre as a whole! Even when 'A+B' per cent of the posts in the service are already manned by the caste/ class as against the 'A' per cent reserved for it, more members of the caste shall continue to be inducted – provided they do not qualify for the service or post on their own!

In the event, the majority of the judges in *Indra Sawhney*, declared that the totality of seats that are reserved in a given year must not exceed 50 per cent – that is, the per cent that is reserved as well as the per cent that is carried over.

As has been the unvarying pattern, the little that the judges left, the political class finished. By the eighty-first amendment to the Constitution, a new clause was added to Article 16: clause 4B. This clause, as we have seen, reads:

Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) *as a separate class of vacancies* to be filled up

in any succeeding year or years and such class of vacancies *shall not be considered together with the vacancies of the year* in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

Promotion: just a facet of recruitment!

The sequence has been entirely predictable. Initially, reservations were confined to recruitment. By 1955, they started creeping into promotions also, albeit in regard to lower posts, and these in peripheral services. The way the courts came to give their imprimatur to this extension tells much about the extent to which exhibitionist egalitarianism had come to hold sway. Recall the two provisions of the Constitution that bear on the matter.

Article 16(1) is entitled, ‘Equality of opportunity in matters of public employment’. It lays down:

There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

Of the expressions in it, notice three: ‘equality of *opportunity*’, ‘matters relating to *employment*’ and ‘*appointment* to any office under the State’.

Article 16(4) lays down:

Nothing in this Article shall prevent the State from making any provision for the reservation of appointment or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

Of the expressions in this clause, notice two: ‘*appointment*’ and ‘*posts*’.

It has been accepted all along that the ambit of Article 16(1) is wider than that of Article 16(4). This is because of the expression, ‘matters relating to employment’ used in the former. This expression, the court has noted in successive judgments, covers salary, periodical increments, leave, gratuity, pension, the age at which an employee will retire. There has been no dispute that in regard to each of these, there shall be equal treatment of

all employees. The state cannot invoke Article 16(4) and decree preferential salaries, pensions, etc., to members of one class vis à vis another.

The can of difficulties got opened quite early on. In *Rangachari*, the Supreme Court split three to two. The majority took the view that Article 16(1) must be 'construed in a broad and general, and not pedantic and technical way'. As such it read into those two expression – 'matters relating to employment/ and 'posts' – special meanings which became the instrument of much elongation in the years to follow.

'Matters relating to employment,' the three judges held, must be taken to cover 'all matters in relation to employment both prior, and subsequent, to the employment which are incidental to the employment and form part of the terms and conditions of such employment'. And that the right and opportunity to be promoted to higher posts within a service is a matter that flows from, is implicit in and is incidental to being inducted into that service.

Second, they emphasized, clause (4) of the article uses 'appointments' and 'posts' separately. There is a long legislative history to the word 'posts'. For decades even before Independence, it was used to refer to posts that were created from time to time *outside* a service. And that practice continues to this day. In UP, for instance, government rules provide for 'X' number of inspectors general of police. Over the years, for a variety of reason – ranging from expansion of the functions that have to be discharged to the need to accommodate officers who cannot be given higher responsibilities yet must be given higher perks and position – 'X+Y' officers are appointed as IGs. The number 'Y' are known as 'ex-cadre posts', and the expression 'posts' has always been taken to refer to these positions that have been created outside the service.

The three judges, however, held that the word 'posts' must be taken to refer to positions at different levels within a service. They gave a circumstantial reason for this construction. Article 16(4) is intended to provide adequate representation in government services to classes that are inadequately represented in the services. If 'posts' is taken to refer to positions outside the services, then reserving a proportion in them can never cure that inadequacy. Hence, by 'posts' the framers must have meant positions at different levels in the service. And, therefore, reservations are valid not just at the stage of appointment but in promotions also.

In putting these expanded constructions on the two expressions, the judges were guided by their belief, as we just noted, that ‘the Constitution has, if we may say so wisely, showed very great solicitude for the advancement of socially and educationally backward classes of citizens.’ And that, therefore, Articles 16(1) and 16(4) must be ‘construed in a broad and general, and not pedantic and technical way’.

The two dissenting judges gave cogent reasons to show that these constructions were not warranted, and would cause much ill. They pointed to the long legislative history of ‘posts’. They pointed to its usage at the time. Justice K.N. Wanchoo furnished an additional reason on account of which the word had been used in addition to ‘appointment’. By ‘posts’ the framers meant the total number of posts in a service, he maintained. They had wanted to secure adequate representation in the services for these sections. If they had confined reservation to just the number that were being recruited in a given year, the effect could well be that for long the sections would remain under-represented in those service – the number recruited in a year would necessarily be a small fraction – say, a twentieth – of the total number in the service; setting aside a third – that is, a third of twentieth – for these sections would mean that it would take too long to secure adequate representation for them. That is why, he reasoned, the framers added the word ‘posts’ – so that reservation could be made for numbers exceeding what would be warranted merely by the numbers being recruited in a particular year.

Both judges pointed out that Article 16(4) is an exception to the fundamental right to equality that is guaranteed to every citizen by Article 16(1); that it is a well-accepted rule of construction that ‘a restriction on a guaranteed right should be narrowly construed so as to afford sufficient scope to the freedom guaranteed’; that ‘the proviso or exception should not be interpreted so liberally as to destroy the fundamental right itself to which it is a proviso or exception,’ or to render it ‘practically illusory’.

Justice K.N. Wanchoo gave a telling example of the sorts of anomalies that would result from the construction that the majority was putting on the expressions. The cumulative effect of the constructions being advanced by the three judges was that the Constitution aimed at ensuring ‘adequate representation’ for the socially and educationally deprived at every level of a service. ‘In some of the top grades there are single posts in the service,’ he

pointed out. 'If at any point of time the incumbent is not a member of the backward class, it would certainly be the case of inadequate representation as regards that post which would mean that such posts which are single may be reserved for all time to be held by members of the backward classes, because if at any moment such a person ceases to hold the post there would be inadequate representation in regard to that post.'¹

However, 3 to 2 is 3 to 2. *Rangachari* endorsed reservations in promotions. The three judges held that, in deciding that the educationally and socially backward classes were not adequately represented in its services, the state 'may refer either to numerical inadequacy of representation in the services or even to the qualitative inadequacy of representation'. 'The advancement of the socially and educationally backward classes requires not only that they should have adequate representation in the lowest rung of services,' the three judges said, 'but that they should aspire to secure adequate representation in selection posts in the services as well. In the context the expression 'adequately represented' imports considerations of 'size' as well as 'values', numbers as well as the nature of appointments held and so it involves not merely the numerical test but also the qualitative one. It is thus by the operation of the numerical and a qualitative test that the adequacy or otherwise of the representation of backward classes in any service has to be judged; and if that be so, it would not be reasonable to hold that the inadequacy of representation can and must be cured only by reserving a proportionately higher percentage of appointments at the initial stage.'² What a breakthrough! Posts up to the highest level must be reserved for sections that, their other characteristics apart, are, by definition, *educationally backward*.

The Central government considered the verdict and issued a government order to the effect that there would *not* be reservations in promotions.

But as the 1970s commenced, 'commitment' was the badge that the judiciary was asked to display, and many revelled in doing so. The Constitution has directed the state to promote the economic and educational interests of the downtrodden 'with special care', these judges recalled. The way to ensure their economic interests is to give them a share in power. To give them a share in power, we must give them a share in positions of the

state apparatus. But as power lies in the top echelons, we must give them a share in the higher posts.

In *N.M. Thomas*, as we have noted, judges other than Justice H.R. Khanna and Justice A.C. Gupta, staked out the progressive position. The Chief Justice, A.N. Ray, whose role during the Emergency is well remembered as a blot on the judiciary, Justice Fazal Ali and, of course, Justice V.R. Krishna Iyer held that, to quote Justice A.N. Ray's words, 'In regard to employment, like other terms and conditions associated with and incidental to it, the promotion to a selection post is also included in the matters relating to employment and even in regard to such promotion to a selection post all that Article 16(1) guarantees is equality of opportunity to all citizens.' He did caution, however, that, while reserving a proportion of promotions, government must bear in mind the impact that step would have on the efficiency of administration because 'It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration.'

Justice Fazal Ali was not to be held back by any caveats. Because of Articles 14 and 16, equality permeates 'the whole spectrum of an individual's employment', he said, 'from appointment through promotion and termination to the payment of gratuity and pension'. The government, accordingly, has full authority to classify employees in different categories, and, within a class, institute measures in favour of Scheduled Castes and Tribes and OBCs so as to ensure real equality.³

Justice Krishna Iyer returned to the matter in *Akhil Bharatiya Soshit Karamchhari Sangh*. He embellished the rhetoric, and enlarged the right.

First he invoked the non-enforceable Directive Principles. 'Every Directive Principle is fundamental in the governance of the country and it shall be the duty of the State to apply that principle in making laws,' he said. Article 46, he said, 'in emphatic terms, obligates the State' 'to promote *with special care* the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.' When Article 46 and Article 16(4) are read together, 'the luscious intent of the Constitution-framers emerges that the

exploited lot of the *harijan-girijan* groups in the past shall *be* extirpated with special care by the State.’ The judge maintained that the inference is ‘obvious’, and it is that ‘administrative participation by SC & ST shall be promoted with special care by the State.’

Justice Krishna Iyer did add the chant, ‘Of course, reservations under Article 16(4) and promotional strategies envisaged by Article 46 may be important but shall not run berserk and imperil administrative efficiency in the name of concessions to backward classes. Article 335 enters a caveat in this behalf...’⁴ But this is just a chant. Almost every progressive judge adds words to this effect even as he puts his seal to measures which cannot but imperil administrative efficiency.

And this becomes clear just a few paragraphs later. The judge notes with approval, ‘Government moved further because real power could be shared by the weakest sections only if the doors of the higher decks were opened to them. The higher echelons are the real controllers, not the menial levels, hierarchically structured as our society is.’ ‘Obviously, Article 16(4) was not designed to get more *harijans* into Government as scavengers and sweepers,’ the judge specified, ‘but as “officers” and “bosses”, so that administrative power may become the common property of the high and low, homogenized and integrated into one community. Social stratification, the bane of the caste system, could be undone and vertical mobility won not by hortative exercises but by experience of *shared power*.’⁵

Eight out of eight

The matter remained one of contention. In *Indra Sawhney*, eight of nine judges held that reservations in promotions were unconstitutional – the ninth judge did not participate on this issue. But five of the eight said that the reservations that existed – including those in promotion – would continue for five years. By the seventy-seventh amendment the Constitution was changed. A new Article 16(4A) was added which explicitly allows reservations in promotions also.

We should pause for a moment and reflect on the reasons that the eight judges who pronounced on the matter gave for holding that there should be no reservations in promotions. Examining them a decade later will awaken us to the damage that has been done by the political class – to the fact that it

had all the warnings to cease and desist, and yet it went ahead and decreed the exact, ruinous measure. Examining what the court said will also lead us to see an all-important lesson: the slightest compromise – by the judiciary, but even in discourse – and the political class will grab it as a handle to pervert things further.

The court noted that in *Rangachari*, it had held that reservations are permissible even in promotions as Article 16(4) contemplates that representation of different sections in government employment must be adequate not just ‘quantitatively’ but also ‘qualitatively’. *Rangachari* had disposed of the requirement imposed by Article 335 ‘on a basis which is not acceptable’, the Supreme Court said pointedly. In *Rangachari*, the risk that such reservations would adversely affect efficiency of administration had been dismissed with the remark, ‘but the risk involved in sacrificing efficiency of administration must always be borne in mind when any State sets about making a provision for reservation of appointments or posts.’ ‘But we see no justification to multiply “the risk”, which would be the consequence of holding that reservation can be provided even in the matter of promotion,’ the court said. ‘While it is certainly just to say that a handicap should be given to backward class of citizens at the stage of initial appointment, *it would be a serious and unacceptable inroad into the rule of equality of opportunity* to say that such a handicap should be provided at every stage of promotion throughout their career.’

There was an important reason both in law, and in practice: once members join a service, they are one class; to give a permanent advantage to some because of their birth would split them into different classes; in practice, such fractionalization will damage governance. ‘*That would mean creation of a permanent separate category* apart from the mainstream – a vertical division of the administrative apparatus,’ the court observed. “The members of reserved categories need not have to compete with others but only among themselves. *There would be no will to work, compete and excel among them*. Whether they work or not, they tend to think, their promotion is assured. This in turn is *bound to generate a feeling of despondence and “heart burning” among open competition members*. All this is bound to affect the efficiency of administration. Putting the members of backward classes on a fast-track would necessarily result in leap-frogging and the deleterious effects of “leap-frogging” need no illustration at our hands.’

Therefore, said the court, ‘At the initial stage of recruitment reservation can be made in favour of backward class of citizens but once they enter the service, efficiency of administration demands that these members too compete with others and earn promotion like all others; no further distinction can be made thereafter with reference to their “birth-mark”, as one of the learned Judges of this Court has said in another connection. *They are expected to operate on equal footing with others. Crutches cannot be provided throughout one’s career.* That would not be in the interest of efficiency of administration nor in the larger interest of the nation.’

Would this not mean that the reserved category employees would be forever confined to the lower rungs of the services? The court refuted the apprehension: meritorious persons could always be inducted at higher levels through direct recruitment, it pointed out. And gave two reasons, one valid, and the other an element of that fatal compromise. First, it pointed out, ‘during the debates in the Constituent Assembly, none referred to reservation in promotions; it does not appear to have been within their contemplation.’

Next, it said that the fact that the reservationists may not make it to the higher posts could be made up through direct recruitment to those levels, and by decreeing reservations in that direct recruitment: ‘It is well-known that direct recruitment takes place at several higher levels of administration and not merely at the level of Class IV and Class III. Direct recruitment is provided even at the level of All India Services. Direct recruitment is provided at the level of District Judges, to give an example nearer home.’ We shall soon see where this leads.

The court was fully cognizant of the arguments that had been advanced and the attempts that had been made to move jurisprudence in the opposite direction, but it was certain that course would be neither constitutional nor wise: ‘It is true that *Rangachari* has been the law for more than 30 years and that attempts to re-open the issue were repelled in *Karamchari Sangh*,’ it said. ‘It may equally be true that on the basis of that decision, reservation may have been provided in the matter of promotion in some of the Central and state services but we are convinced that the majority opinion in *Rangachari* to the extent it holds, that Article 16(4) permits reservation even in the matter of promotion, is not sustainable in principle and ought to

be departed from.’ Reservations in promotions would result in ‘invidious discrimination’, it said.

‘Betrays the present as well as the future of the nation’

Apart from the unconstitutionality, the court was gravely concerned about the way reservations in promotions would affect governance. ‘To be overlooked at the time of promotion in favour of a person who is junior in service and having no claim to superior merits,’ the court stressed, ‘is to cause frustration and passionate prejudice, hostility and ill will not only in the mind of the overlooked candidate, but also in the minds of the generality of employees. Any such discrimination is unfair and it causes dissatisfaction, indiscipline and inefficiency.’

Article 335, the court reminded us, requires that ‘in the making of appointments to services and posts in connection with the affairs of the Union or of a state’ the claims of the members of the Scheduled Castes and the Scheduled Tribes must be considered ‘consistently with the maintenance of efficiency of administration’. ‘If that is the constitutional mandate with regard to the Scheduled Castes and the Scheduled Tribes, the same principle must necessarily hold good in respect of all backward classes of citizens,’ it pointed out, adverting to the government order that was in question before it. ‘The requirement of efficiency is an overriding mandate of the Constitution. An inefficient administration betrays the present as well as the future of the nation.’

‘It is foolhardy to ignore the consequences to the administration when juniors supersede seniors although the seniors are as much or even more competent than the juniors,’ the court stated. ‘When reservations are kept in promotion, the inevitable consequence is the phenomenon of juniors, however low in the seniority list, stealing a march over their seniors to the promotional post. When further reservations are kept at every promotional level, the juniors not only steal march over their seniors in the same grade but also over their superiors at more than one higher level. This has been witnessed and is being witnessed frequently wherever reservations are kept in promotions. It is naive to expect that in such circumstances those who are superseded, (and they are many) can work with equanimity and with the same devotion to and interest in work as they did before. Men are not

saints. The inevitable result, in all fields of administration, of this phenomenon is the natural resentment, heart-burning, frustration, lack of interest in work and indifference to the duties, disrespect to the superiors, dishonour of the authority and an atmosphere of constant bickerings and hostility in the administration. When, further, the erstwhile subordinate becomes the present superior, the vitiation of the atmosphere has only to be imagined. This has admittedly a deleterious effect on the entire administration.'

The damage is twice over. 'It is not only the efficiency of those who are thus superseded which deteriorates on account of such promotions,' the court continued, 'but those superseding have also no incentive to put in their best in work. Since they know that in any case they would be promoted in their reserved quota, they have no motivation to work hard. Being assured of the promotion from the beginning, their attitude towards their duties and their colleagues and superiors is also coloured by this complex. On that account also the efficiency of administration is jeopardised.'

Moreover, efficiency is promoted or marred not just by the effect of a measure on an individual – whether he feels the system is recognizing the effort he is putting in, whether he feels that it is just as between him and his colleagues, whether beneficiaries of preferential consideration have sufficient incentive thereafter to put in their best – but also by the effect it has on the overall atmosphere in which the government service functions. 'The expression "consistently with the maintenance of efficiency of administration" used in Article 335 is related not only to the qualifications of those who are appointed, *it covers all consequences to the efficiency of administration on account of such appointments*,' the court emphasized. 'They would necessarily include the demoralisation of those already in employment who would be adversely affected by such appointments, and its effect on the efficiency of administration. The only reward that a loyal, sincere and hard-working employee expects and looks forward to in his service career is promotion. If that itself is denied to him for no deficiency on his part, it places a frustrating damper on his zeal to work and reduces him to a nervous wreck. There cannot be a more damaging effect on the administration than that caused by an unreasonable obstruction in the advancement of the career of those who run the administration. The

reservations in promotions are, therefore, inconsistent with the efficiency of administration and are impermissible under the Constitution.’

And there was another manifest reason: the Constitution allows discrimination as between different classes; once the candidates enter a service, they become part of one stream, and ‘the past injustice stands removed.’ Therefore, to discriminate between them after that point of entry is unconstitutional.

Finally, the facility that has been permitted by the Constitution – of reservation – is for *groups*. But promotion is given to an *individual* – ‘It is one against the other.’ Justice Kuldip Singh points out in *Indra Sawhney* that Article 16(4) enables the executive to decree reservations for a *class*. But when posts in successive steps of the hierarchy are reserved, the benefit accrues, not to a class but to individuals.

The compromise

But then came the compromise, and it was threefold. First, as we noted, the court said that the restriction – that there must not be any reservations in promotion – could be circumvented through direct recruitment. This itself blunted much of what the court had said in such strong words. Not only that, the court said that for this purpose the government could grant concessions and relaxations in the prescribed standards, adding the caveat of no effect, that while doing so the government should ensure that the efficiency of administration is not compromised.

The ambivalence and ‘balancing’ can be seen by perusing Justice Sawant’s formulations. On the one hand, he declared that Article 16(4) is intended to redistribute power; that power resides in the upper reaches of administration; that, therefore, adequate representation means that the backwards must be adequately represented at all levels and not just numerically in the service as a whole. But on the other hand, he penned some of the most uncompromising passages on why there should be no reservations in promotions as these would mar efficiency of administration. On the one hand, he stressed that, as sharing power is the objective, the backwards should get adequate representation in the higher reaches of administration also. But, on the other, he warned that such representation ‘cannot be achieved overnight or in one generation’. Moreover, he said,

‘such representation cannot be secured at the cost of the efficiency of the administration which is an equally paramount consideration while keeping reservations.’ Accordingly, he suggested that persons be recruited directly at higher levels, and that there be reservations in such direct recruitment; that persons from backward castes be given such special assistance as they may require to qualify for recruitment to those posts; that there be persons from these backward castes in the selection committees, and so on.

But many of these measures will in practice injure the efficiency of administration in exactly the same way and to the same extent as reservations in promotions.

Second, the court specified that its decision on this aspect would operate only prospectively. Third, and most consequential, it said that

wherever reservations are already provided in the matter of promotion – be it Central Services or State Services, or for that matter services under any corporation, authority or body falling under the definition of ‘State’ in Article 12 – *such reservations shall continue in operation for a period of five years from this day*. Within this period, it would be open to the appropriate authorities to revise, modify or re-issue the relevant Rules to ensure the achievement of the objective of Article 16(4). If any authority thinks that for ensuring adequate representation of ‘backward class of citizens’ in any service, class or category, it is necessary to provide for direct recruitment therein, it shall be open to it to do so.⁶

That opening was enough for the political class. The court may have said that the executive or legislature could amend rules, etc., to provide for direct recruitment. The two, in fact, amended the Constitution itself so as to reduce its ruling to a nullity!

*Do the reasons evaporate because
the Constitution has been amended?*

Now, the point to remember is the following: the reasons that the court gave for holding reservations in promotions to be imprudent and worse would continue to be just as valid five years after 1992 as they were at the time. But all of them were forgotten, they were perforce forgotten once the Constitution was amended during those five years!

- Would reservations in promotions be a less ‘serious and unacceptable inroad into the rule of equality of opportunity’?

- Would they cease to ‘mean creation of a permanent separate category’?
- Would they suddenly cease to ‘generate a feeling of despondence and ‘heart-burning’ among open competition members’?
- Would they no longer ‘cause frustration and passionate prejudice, hostility and ill will not only in the mind of the overlooked candidate, but also in the minds of the generality of employees’?
- Would the fact that ‘such discrimination is unfair and it causes dissatisfaction, indiscipline and inefficiency’ disappear?
- Would it be less ‘foolhardy to ignore the consequences to the administration when juniors supersede seniors although the seniors are as much or even more competent than the juniors’?
- Will men suddenly become saints and it no longer be the case that the inevitable result ‘in all fields of administration, of this phenomenon is the natural resentment, heart-burning, frustration, lack of interest in work and indifference to the duties, disrespect to the superiors, dishonour of the authority and an atmosphere of constant bickerings and hostility in the administration’?
- Will those who are now certain that they *will* be promoted just because of their birth suddenly get ‘incentive to put in their best in work’ from some other quarter?
- Do the facts that employees form one stream, and that there can be no discrimination within one stream, become invalid?

The wages of compromise

There is an all-important lesson in this sequence. That the executive and legislature will use the window of five years to overturn the judgment could have been anticipated. Indeed, there could have been no doubt about that at all. Yet, the court went in for a compromise. When I first read the relevant passages in *Indira Sawhney*, I was reminded of the disastrous compromise that Justice Krishna Iyer had articulated in 1975. Mrs Indira Gandhi had been held guilty of corrupt electoral practices by the Allahabad High Court. The judgment entailed her disqualification from the Lok Sabha. The judge, Justice Sinha, had given her a stay in case she wanted to file an appeal. She filed the appeal in the Supreme Court. It came before Justice Krishna Iyer as vacation judge. At the very beginning he said, ‘*the proceedings in the*

Halls of Justice must be informed, to some extent, by the great verity that the broad sweep of human history is guided by sociological forces beyond the ken of the noisy hour or the quirk of legal nicety. Life is larger than Law,’ thus indicating the considerations that would weigh with him. The Allahabad verdict would entail unseating a prime minister. Precedents had been cited by counsel from both sides ‘and courts look for light, *inter alia*, from practice and precedent, without however being hidebound mechanically by the past alone. After all, judicial power is dynamic, forward-looking and socially lucent and aware.’ ‘Suffice it to say,’ he said, ‘that the power of the Court *must rise to the occasion, if justice, in its larger connotation, is the goal – and it is.*’ ‘We should pay heed to the peroration, as these are the very premise – about law, about the proper role of the judiciary – that lead to the excesses that are the main subject matter of this essay.

He was aware of the dilemma that confronts courts, he indicated, and there was a way out.

‘This brings to the fore an activist interrogation about the cognisability of such considerations by a court,’ he said, adverting to the considerations that counsel had urged. ‘Do the judicial process and its traditional methodology sometimes make the Judicature look archaic, with eyes open on law and closed on society, forgetting the integral *yoga* of law and society? If national crises and democratic considerations, and not mere “balance of convenience and interests of justice”, were to be major inputs in the Judge’s exercise of discretion, systemic changes and shifts in judicial attitudes may perhaps be needed’ – something he had all along presumed is his task to blaze into our jurisprudence. But there was a handicap, he indicated: ‘Sitting in time-honoured forensic surroundings I *am constrained to judge the issues before me by the canons sanctified by the usage of this Court.*’

‘At first flush,’ he said, ‘I was disposed to prolong the “absolute stay” granted by the High Court.’ ‘The nature of the invalidatory grounds upheld by the High Court, I agree, does not involve the petitioner [Mrs Indira Gandhi] in any of the graver electoral vices set out in Section 123 of the [Representation of Peoples] Act.’ But there are two problems, he indicated. One, ‘The High Court’s finding, until upset, holds good, however weak it

may ultimately prove.’ Second, ‘Draconian laws do not cease to be law in court...’

For these and other considerations, he gave a conditional stay – Mrs Gandhi would continue as member of Parliament, she would continue to have the right to participate in the proceedings, but she would not have the right to vote. Of course, Justice Krishna Iyer was quick to note that the latter condition was ‘currently academic’ only as Parliament was not in session.

And he indicated the way out. ‘Draconian laws do not cease to be law in court...,’ explaining the constraint under which he was functioning, as we saw, but he had added, *‘but must alert a wakeful and quick-acting Legislature’*⁷

That ‘dynamic, forward-looking and socially lucent and aware’ advice ‘guided’ as it was ‘by sociological forces beyond the ken of the noisy hour or the quirk of legal nicety’ proved just right! His compromise judgment did just what he had said it should: ‘alert a wakeful and quick-acting Legislature.’

The ‘wakeful and quick-acting Legislature’ passed the thirty-ninth amendment of the Constitution – without discussion, all in one day. The state legislatures proved equally ‘wakeful and quick-acting’ – they ratified the amendment within a day. So that when the court reconvened to hear the case, it had to consider it in the light of the new provisions!

They were such that, as a prophylactic, we should have children memorize them in schools:

- The election of a person who at the time of the election or thereafter is appointed prime minister shall not be called in question ‘except before such authority... or body and in such manner as may be provided for by or under any law made by Parliament and any such law may provide for all other matters relating to doubts and disputes in relation to such election including the grounds on which such election may be questioned.’
- “The validity of any such law... and the decision of any authority or body under such law shall not be called in question in any court.’

- ‘Where any person is appointed as Prime Minister... while an election petition... in respect of his election to either House of Parliament or, as the case may be, to the House of the People is pending, such election petition shall abate upon such person being appointed as Prime Minister....’
- The diabolic and conclusive clause (4): ‘No law made by Parliament before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, in so far as it relates to election petitions and matters connected therewith, shall apply or shall be deemed ever to have applied to or in relation to the election of any such person... and such election shall not be deemed to be void or ever to have become void on any ground on which such election could be declared void or has, before such commencement, been declared to be void under any such law and notwithstanding any order made by any court, before such commencement, declaring such election to be void, such election shall continue to be valid in all respects and any such order and any finding on which such order is based shall be and shall be deemed always to have been void and of no effect.’
- ‘Any appeal or cross appeal against any such order of any court as is referred to in clause (4) [the preceding sub-para] pending immediately before the commencement of the Constitution (Thirty-ninth Amendment) Act, 1975, before the Supreme Court shall be disposed of in conformity with the provisions of clause (4).’

The country had to bear the cost of the progressive guidance! And so had jurisprudence, and indeed the Supreme Court itself: for it had to go in for even greater convolutions in the main case, *Indira Nehru Gandhi v. Raj Narain*.⁸

As we shall see on more than one occasion, the court is too prone to being considerate, to temporize, to postpone the issue. We have seen how its explicit ruling that reservations must not exceed 50 per cent was overturned in exactly the same way by exactly the same agency, ‘wakeful and quick-acting’ legislatures. The Tamil Nadu legislature and then Parliament passed the Tamil Nadu Backward Classes, Scheduled Castes and Scheduled Tribes (Reservation of Seats in Educational Institutions and of

appointments or posts in the Services under the State) Act, 1993, and put it in the Ninth Schedule – that is, beyond the reach of courts.

The constitutionality of this act was challenged. The writ was referred to a seven-judge bench – *in 1994*. For *eleven years*, the court has been passing an interim order every year directing the state government to create a few extra seats in its medical and engineering colleges so that candidates from non-reservation castes, who would have got in on merit but have been denied admission because the seats have been set aside for the reservationists, do not suffer. The basic issue has not been faced.⁹ What is the inference that the political class draws from such indefinite deferment? That it can ram its convenience, and the court will look the other way.

That is an all-important lesson: temporizing will not do; the merest nod – even the customary way the polite liberal begins his response, ‘There is much in what you say... May I just put the other side of the picture for a minute?’, will be enough for the political class, as it is indeed for the progressive judge who follows. That class and that sort of judge will run with it, insisting that the court itself was not certain about what it was holding, that it acknowledged, ‘There is much in what you say,’ that it was itself conscious that it was presenting just one side of the matter... The country cannot be drawn out of the abyss through convoluted compromises. The axe has to be put at the root.

The court went in for the compromise again when it came to the operational part of its pronouncements on reservations in promotions.

The ‘wakeful and quick-acting Legislature’ amended the Constitution, and nullified the court’s ruling on the matter.

The Constitution amended, the court itself has been repeating everything that it had said was ruinous. Indeed, as is the wont of progressives, each succeeding judge has felt compelled to embellish what has been stated in the preceding judgment, he has enlarged the ‘rights’ step by disastrous step.

A single illustration will have to suffice.

The progressive march

In *Ashok Kumar Gupta v. State of U.P.*, the Supreme Court holds:

- Article 16(4) aims at providing ‘adequate representation’ to SC/ST/OBCs in government services. Unless these groups get reservations in the higher posts, they will not be ‘adequately represented’.
- When a person gets recruited to a service, he assumes all the duties that go with the service, and he acquires a right to all the incidents of that service. Getting to the higher positions is one of the rights he acquires by virtue of joining that service. In a word, promotion is a facet of recruitment. ‘Right to promotion *is a method of recruitment* from one cadre to another higher cadre or class or category or grade of posts or classes of posts or offices, as the case may be,’ the Supreme Court says. ‘Reservation in promotion has been evolved as a facet of equality where the appropriate Government is of the opinion that the Dalits and Tribes are not adequately represented *in the class or classes of posts in diverse cadres, grade, category of posts or classes of posts.*’

Notice the elongation. The Constitution speaks of adequate representation in the service. By these words, the court reads into the Constitution the mandate for adequate representation in each of the various ‘grades, categories of posts or classes of posts’. The court continues, “The discrimination, therefore, by operation of protective discrimination and distributive justice is inherent in the principle of reservation and equality too by way of promotion but the same was evolved as a part of social and economic justice assured in the Preamble and Articles 38, 46, 14, 16(1), 16(4) and 16(4A) of the Constitution. The *right to equality, dignity of person and equality of status and of opportunity* are fundamental rights to bring the Dalits and the Tribes in the Mainstream of the national life.’

- Next, ‘Every citizen or group of people has a right to share in the governance of the State,’ the Supreme Court holds. “The Dalits and Tribes equally being citizens have a right to share in the governance of the State... The right to seek equality of opportunity to an office or a post under the State is a guaranteed fundamental right to all citizens under Article 16(1), the species of Article 14, the genus.’

Notice again the elongation and interpolation. What is a prohibition – that the state shall not discriminate against any one on the ground of sex,

creed, caste, etc. – becomes a right to a service. What is a right to have an equal opportunity to enter a service becomes a right to actually enter the service. Next, the right to have an equal opportunity to be in a *service* becomes the right to be at *every level in the hierarchy*, indeed in every *post*.

Nor are the judges in any doubt that to elongate and interpolate in this way is not just their right, it is their duty. For, they say, ‘In *Delhi Transport Corporation v. D.T.C. Mazdoor Congress and Ors.*, [1991] Supp. 1 SCC 600 at 73 7 para 271 it was held that law is a social engineering to remove the existing imbalance and to further the progress, serving the needs of the Socialist Democratic Bharat under the Rule of Law. The prevailing social conditions and actualities of life are to be taken into account in adjudging whether or not the impugned legislation would subserve the purpose of the society.’

- Social justice is a Fundamental Right. Economic empowerment is a Fundamental Right. Moreover, the disadvantaged have a guaranteed right to equality of status and dignity. None of these can be secured until the disadvantaged get into the higher posts.
- Not just that, unless the SC/ST/OBCs get hold of the higher posts, the equality would be there only on paper, only in law, not in fact.

The court’s pronouncements on this matter take us to the next brick by which the structure is constructed. The court says:

It is obvious that equality in law precludes discrimination of any kind whereas equality in fact may involve the necessity of differential treatment in order to attain a result which establishes an equilibrium between different situations. To give adequate representation to the Dalits and Tribes *in all posts or classes of posts or services*, a reality and truism, facilities and opportunities, as enjoined in Article 38, are required to be provided to them to achieve the equality of representation in real content.¹⁰

Tautology becomes reason!

- All must have equal opportunity.
- Clearly, if the SCs/STs/OBCs are not found sitting in the higher posts, the equality of opportunity that was afforded was nothing but a sham.

And when would we know that the equality of opportunity that the system made available is real? Only when the SCs/STs/OBCs are found sitting in the higher posts. And, given the perversities inherent in the criteria that have been devised to adjudge merit, given too the perversities that are congenital in those who are to adjudge merit, this can only happen if others are excluded from these posts, and the posts are reserved for the SCs/STs/OBCs. Q.E.D.

From equality of opportunity to that of outcomes,
From absence of disabilities to presence of abilities,
From providing assistance to imposing handicaps

The Constitution is clear as can be: it prohibits discrimination on grounds of sex, caste, race, etc.; it guarantees every citizen equality before law; it guarantees every citizen equal opportunity to access public employment.

But ‘whether there is equality of opportunity,’ Justice K.K. Mathew observed in *N.M. Thomas*, ‘can be gauged only by the equality attained in the result. Formally equality of opportunity simply enables people with more education and intelligence to capture all the posts and to win over the less fortunate in education and talent even when the competition is fair.

Equality of result is the test of equality of opportunity.’¹ Reservations are illustrative of the measures that the State ‘must take’ to ‘wipe out’ the distinction between ‘formal or legal equality’ and ‘equality in fact’, Justice O. Chinnappa Reddy says in *Akhil Bharatiya Soshit Karamchari Sangh*, thus reading his own goal into the Constitution. ‘Equality of opportunity must be such as to yield “Equality of results” and not that which simply enables people, socially and economically better placed, to win against the less fortunate, when the competition is itself otherwise equitable.’²

Notice two features. The objective the judge sets out is to ‘*wipe out*’ the distinction between equality of opportunity – which is what the Constitution mention – and equality of result – which is what progressive judges have read into it. *Wipe out*? Which society has ever been able to *wipe out* that distinction? Once an objective is defined in this manner, does it not become the ground for perpetuating measures like reservations indefinitely? Is it not

the case, in fact, that the cry of wiping out distinctions has been the principal device by which other value – such as liberty – have been crushed? Progressives must surely be the first to know that – having spent lifetimes internalizing histories of the Soviet Union and East European countries.

Second, notice that, while progressive judges justify their assertions in this context on the ground that unless equality is brought about in *results*, a measure like reservations ‘simply enables people, socially and economically better placed, to win against the less fortunate,’ many of them vehemently reject the proposition that, within SCs/STs/ OBCs, the ‘creamy layer’ shall ‘win against the less fortunate’, and therefore it must be hived off.

What was a provision to ensure that no individual is barred or discriminated against on grounds of caste, etc., has thus been converted into a directive to ensure that he gets into the service. There has been another ‘creative application’, so to say, by which the fundamental guarantee of equality to each individual has been chiselled further. The judges have maintained that Articles 15(4) and 16(4) speak of helping ‘classes’ – that is, they aim at eliminating the backwardness of *groups*. Hence, the right of an individual to equal opportunity cannot be allowed to stand in the way of the right of the socially and educationally backward group to have preferential access.

This, of course, has been built up storey by storey in each successive judgment. By the time we come to *Post-Graduate Institute of Medical Education and Research*, the Supreme Court is dismissing the concern for the individual’s right to equal opportunity in this context as ‘absurd’, and declaring that it ‘cannot countenance’ even the suggestion that the individual’s right should be borne in mind – when measures have been instituted for a disadvantaged group’s advancement. It reiterates what it has said in *Dr Pradeep Jain v. Union of India*:³ ‘Now the concept of equality under the Constitution is a dynamic concept. It takes within its sweep every process of equalization and protective discrimination. Equality must not remain mere idle incantation but it must become a living reality for the large masses of people. In a hierarchical society with an indelible feudal stamp and incurable actual inequality, it is absurd to suggest the progressive

measures to eliminate group disabilities and promote collective equality are antagonistic to equality on the ground that every individual is entitled to equality of opportunity based purely on merit judged by the marks obtained by him. We cannot countenance such a suggestion, for to do so would make the equality clause sterile and perpetuate existing inequalities.’⁴

Next comes the plea of practicality. In education, while adhering to merit, while admitting students on the basis of a test that adjudges their merit across the country as a whole are ideals, they cannot be secured in practice, we learn in other judgments. Tests of qualifications across states and the country may provide equality of opportunity, but they will ensure inequality in results, and that will be proof that opportunities are in fact not equal. Hence, says the Supreme Court, ‘...There can be no doubt that the policy of ensuring admissions to the MBBS course on all-India basis is a highly desirable policy, based as it is on the postulate that India is one nation and every citizen of India is entitled to have equal opportunity for education and advancement, but it is an ideal to be aimed at and it may not be realistically possible, in the present circumstances, to adopt it, for it cannot produce real equality of opportunity unless there is complete absence of disparities and inequalities – a situation which simply does not exist in the country today’

Notice again, the height at which the bar is being placed: ‘unless there is *complete absence of disparities and inequalities*’.

‘There are massive social and economic disparities and inequalities,’ a ‘yawning gap’ the court says, citing earlier rulings, and it lists them – between states; between regions within a state; between citizens and citizens within one region in one state; between rich and poor. In each of these categories, the one – who are not well placed will just not be able to compete with those who are better off.’⁵

We can be certain that the situation that the Supreme Court envisages in such judgment – ‘complete absence of disparities and inequalities’; the elimination of differences between state and state, between regions within each state, between citizen and citizen within each region in each state, between well-to-do and poor – will not come to pass in several lifetimes.

In governmental services, ‘real equality’, equality of results will not be the case unless the SC/ST/OBCs occupy the higher posts, the progressive

judges say – for that is where power, status, dignity reside. To lift them into those higher levels is the duty of the state, and reservation of these posts for the SC/ST/OBCs is the necessary means. But even that is not enough, says the Supreme Court. In *Dr Pradeep Jain*, the court says, ‘Equality of opportunity is not simply a matter of legal equality. *Its existence depends not merely on the absence of disabilities hut on the presence of abilities.*’

Even that is not enough, the Court proceeds to say: ‘...It is, therefore, necessary to take into account *de facto* inequalities which exist in the society and to take affirmative action by way of giving preference to the socially and economically disadvantaged persons *or inflicting handicaps on those more advantageously placed*, in order to bring about real equality.’

The scales are by now completely overturned: ‘Such affirmative action though apparently discriminatory is calculated to produce equality on a broader basis by eliminating *de facto* inequalities and placing the weaker sections or the community on footing of equality with the stronger and more powerful sections so that each member of the community, whatever is his birth, occupation or social position may enjoy equal opportunity of using to the full his natural endowments of physique, of character and of intelligence.’

And then occurs another feature of such judgments. One of the judges who is in this bench had expressed himself on the matter in an earlier case – the position he staked out then is repeated now, and becomes thereby the verdict of the court. In *Marri Chandra Shekhar Rao v. Dean, Seth G.S. Medical College*, the court said, ‘*De jure* equality must ultimately find its *raison d’etre* in *de facto* equality. The State must, therefore, resort to compensatory State action for the purpose of making people who are factually unequal in their wealth, education or social environment, equal in specified areas. It is necessary to take into account *de facto* inequalities which exist in the society and to take affirmative action by way of giving preference and reservation to the socially and economically disadvantaged persons *or inflicting handicaps on those more advantageously placed*, in order to bring about real equality.’ The judge maintained that ‘Such affirmative action though apparently discriminatory is calculated to produce equality on a broader basis by eliminating *de facto* inequalities...,’ and is therefore not just justified, but is in fact mandatory.⁶

What is in one case the formulation of one judge, becomes in a subsequent case the opinion of the whole bench – of which that one judge is a member! Notice, how the judges deliberately confound equality of *opportunity*, the right that has been guaranteed in the Constitution, with equality of *outcomes*. Notice what they encompass under what they call ‘affirmative action’ – in their reckoning, this is not limited to steps that would enable those who are not well equipped to become better able to compete with others; it necessarily entails weighing the better equipped down with handicaps. The court proceeds to intermingle these notions, and twice reproduces words to the same effect – unequals have to be treated unequally, etc., and decrees, ‘It would, therefore, be necessary to take into account *de facto* inequality in which exists the society and to take affirmative action *by giving preferences and making reservation in promotions* in favour of the Dalits and Tribes or by “*inflicting handicaps on those more advantageously placed*”, in order to bring about equality. Such affirmative action, though apparently discriminatory, is calculated to produce equality on a broader basis by eliminating *de facto* inequality and placing Dalits and Tribes on the footing of equality with non-tribal employees so as to enable them to enjoy equal opportunity and to unfold their full potentiality...’

Such ‘protective discrimination’ is what the court says is ‘envisaged’ in Articles 16(4) and 16(4A). As equality in results cannot be brought about without reservations in promotions, such reservations are just carrying out the command of the Constitution.⁷

Three questions:

- Is it that the Supreme Court which is always so anxious that we go by empirical evidence, that we desist from conjectures, is it that that court has suddenly come upon some empirical evidence about the effects on efficiency of administration of reservations in promotions to so completely repudiate what it had so emphatically stated in *Indra Sawhney*?
- In the alternate, has the fact that the political class has inserted a new clause in the Constitution had such a powerful intellectual influence on

the court as to make it repudiate what eight out of eight judges had said so unambiguously in that landmark case?

- In the ‘alternate to the alternate’, is this assessment – this empirical assessment – of the effects of reservations in promotion just the subjective assertion of one progressive judge? I say ‘subjective assertion’, for the judge does not adduce any evidence to support what he is asserting.

From ‘less than 50 per cent’ to ‘Even 100 per cent’

Indeed, proceeding along this route, the Supreme Court comes to hold that, even if there is just one single post at the top, and reserving it would amount to 100 per cent reservation; even then, confining it, by rotation, or through the roster, to Scheduled Castes and Tribes or the Backward Classes will be fully in accord with the Constitution. Indeed, reserving that single post for SCs/STs ‘is consistent with equality of opportunity on par with others’. How excluding everyone else from that single post ‘is consistent with equality of opportunity on par with others’ is, of course, not explained!⁸

These judgments had gone so far overboard that the court had eventually to reverse them. When just one post is available, the court has since held, to reserve it is to completely exclude the entire population that has not been listed in schedules. This violates the fundamental right to equality, and is therefore not permissible.⁹ That things had to go so far before the court would call a halt itself shows how difficult our polity – and we must include the judiciary in that – now finds it to draw a line.

Creative reading!

But the judgments in which reservation of a post when that is the only one available illustrate another feature of activism. In delivering those judgments the judges had declared that they were following a line of precedents. They had cited the Constitution bench’s judgment in *Arati Ray Choudhry v. Union of India*¹⁰ and other cases, and maintained that in these cases the Supreme Court had held that reservation of single posts with the help of the Roster System was entirely constitutional. The Constitution

bench of five judges which heard the appeal set out what had actually been held in these cases, and was constrained to point out that the judgments the judges had cited had *not* held that reservation in single posts was constitutional! It cited case after case which, it was compelled to note, the judges had ‘not properly appreciated’. Their inference about what the court had held in those cases rested, it was compelled to note, on ‘erroneous assumption’ and ‘on account of a misreading.’¹¹

But when such constructions are put on ‘equality’, will those who do not happen to have been born to disadvantaged parents not become victims of reverse discrimination? Would that not violate the very notion – the Basic Structure of the Constitution – in the name of which ‘equality’ is pushed to such lengths? The judges brush that aside. As is usual in such matters, Justice Krishna Iyer leads the way. In *Maharao Sahib Shri Bhim Singhji v. Union of India*, he declaims: ‘The question of basic structure being breached cannot arise when we examine the *vires* of an ordinary legislation as distinguished from a constitutional amendment. *Kesavananda Bharati cannot be the last refuge of the proprietariat* when benign legislation takes away their “excess” for societal weal. Nor, indeed, can every breach of equality spell disaster as a lethal violation of the basic structure. Peripheral inequality is inevitable when large-scale equalisation processes are put into action...’ ‘Every large cause claims some martyr, as sociologists will know,’ the judge proclaims. ‘Therefore, what is a betrayal of the basic feature is *not a mere violation of Article 14 but a shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice.*’

Hence, anyone questioning a measure must establish not just that it is ‘not a mere violation of Article 14 but a shocking, unconscionable or unscrupulous travesty of the quintessence of equal justice,’ and in addition that he is not using *Kesavananda Bharati* as ‘the last refuge of the Proprietariat’.

The judgment in *Kesvananda Bharati* now becomes a ‘ghost. The activist judge proceeds, ‘If a legislation does go that far it shakes the democratic foundation and must suffer the death penalty. But to permit the *Bharati* ghost to haunt the corridors of the court brandishing fatal writs for every feature of inequality is judicial paralysation of parliamentary function.’

You must, therefore, establish that you are not invoking ghosts!

‘Nor can the constitutional fascination for the basic structure doctrine be made a trojan horse to penetrate the entire legislative camp fighting for a new social order and to overpower the battle for abolition of basic poverty by the “basic structure” missile. Which is more basic? Eradication of die-hard, deadly and pervasive penury degrading all human rights or upholding of the legal luxury of perfect symmetry and absolute equality attractively presented to preserve the *status quo ante*? To use the Constitution to defeat the Constitution cannot find favour with the judiciary! I have no doubt that the strategy of using the missile of “equality” to preserve die-hard, dreadful societal inequality is a stratagem which must be given short shrift by this Court.’¹²

The net result of such ‘reasoning’ is that anyone who may be raising perfectly valid questions in law is now put to first prove that he is not using Trojan Horses to fire missiles for sabotaging efforts aimed at bringing succour to the starving millions.

But the judge hath spoken, all disputation is ended. And the ‘reasoning’ becomes handy scripture in subsequent judgments.¹³

Conspiracy! Conspiracy!

‘Merit-mongers’

Justice V.R. Krishna Iyer who we saw declare in *N.M. Thomas*, ‘You can’t throw to the winds considerations of administrative capability and grind the wheels of Government to a halt in the name of “*harijan* welfare”. The administration runs for good government, not to give jobs to *harijans*....’ in *Akhil Bharatiya Soshit Karamchari* pooh-poohs the consideration of efficiency. In this case – the judgment on which became quite the banner of progressive jurisprudence at the time -Justice Krishna Iyer disposes of the apprehensions about inefficiency by arguing, as he did in *N.M. Thomas*, that the posts in question are clerical posts, and the way duties are discharged in them just cannot have that much impact on the efficiency of governance as a whole. He notes too that in *Rangachari*, the Supreme Court has already accepted reservation in higher posts: ‘If, in selecting top officers you may reserve posts for SC/ST with lesser merit,’ he holds, ‘how can you rationally argue that for the posts of peons or lower division clerks reservation will spell calamity? The part that efficiency plays is far more in the case of higher posts than in the appointments to the lower posts.’

The Railways had decreed that there shall be reservations not only at the entrance but also in promotions; that there shall be reservations in promotions in both non-selection and selection posts; that, not 50 per cent, but 66 2/3 per cent of all seats at the entrance as well as in promotions shall be reserved; that the Scheduled Caste and Scheduled Tribe employees shall be deemed to have secured an assessment one grade higher than the one that their superiors in service have assigned them; that reserved vacancies in the higher posts not filled this year shall be carried over for three years; and so on. The very judge who has earlier proclaimed that efficiency of administration must be a paramount consideration while framing

ameliorative measures like reservations now dismisses the apprehension with invective.

‘Trite arguments about efficiency and inefficiency are a trifle phoney,’ Justice Krishna Iyer declares in a passage that will become a favourite of many a progressive successor judge, ‘because, after all, at the higher levels the *harijan/girijan* appointees are a microscopic percentage and, even in the case of Classes III and II posts, they are negligible. The preponderant majority coming from the unreserved communities are presumably efficient and the dilution of efficiency caused by the minimal induction of a small percentage of ‘reserved’ candidates cannot affect the overall administrative efficiency significantly. Indeed, it will be gross exaggeration to visualise a collapse of the Administration because 5 to 10 per cent of the total number of officials in the various classes happen to be substandard. Moreover, care has been taken to give in-service training and coaching to correct the deficiency.’¹

Notice, in *N.M. Thomas*, reservations were approved on the ground that the posts in question were just clerical posts. In *Soshit Karamchhari Sangh*, they are being approved on the ground that they are but a microscopic fraction of the total number of posts. But the ‘principle’ that gets carried forward, so to say, into subsequent judgments is that in these cases, as in *Rangachari*, the Supreme Court has approved reservations in promotions!

In all services.

To all levels.

And at least 50 per cent reservations of posts at all levels in all services.

Have standards been going down all round? Does this not suggest that we should seize every opportunity to arrest this trend? Or does it suggest that, as standards are going down all round, why should we be particular about the sphere before us? Here is the perspective that Justice Krishna Iyer advances: yes, standards may have been falling; but the world has been going forward; only those are mongering on about merit whose personal interests are set back by the reservations policy.

‘It is fashionable to say,’ he says, ‘and there is, perhaps, some truth in it,’ he allows as a good debater should, ‘that from generation to generation there is a deterioration in efficiency in all walks of life from politics to pedagogy to officialdom and other professions.’ But of what account is

that? After all, 'Nevertheless, the world has been going forward and only parties whose personal interest is affected forecast a doom on account of progressive deficiency in efficiency.' 'We are not impressed with the misfortune predicted about governmental personnel being manned by morons' – who had said that government was coming to be manned by 'morons'? – 'merely because a sprinkling of *harijans/girijans* happen to find their way into the services' – the order in question has decreed that 66% per cent of vacancies will be reserved, to the Judge 66 2/3 per cent are just 'a sprinkling'. That is followed by compassion: 'Their apathy and backwardness are such that in spite of these favourable provisions, the unfortunates have neither the awareness nor qualified members to take their rightful place in the administration of the country.' And then, 'The malady of modern India lies elsewhere, and the merit-mongers are greater risks in many respects than the naive tribals and the slightly better off low castes'. Was Pandit Nehru a 'merit-monger'? Most certainly: recall that letter he wrote to the chief ministers in 1961! Were the framers of the Constitution 'merit-mongers'? Most certainly: because they incorporated Article 335 in the Constitution!

'Nor does the specious plea that because a few *harijans* are better off, therefore, the bulk at the bottom deserves no jack-up provisions merit scrutiny,' Justice Krishna Iyer says, the very Krishna Iyer who has dilated at length on how the better off among the dispossessed inflict double injury by hogging benefits of reservations. 'A swallow does not make a summer.' Then, as we noted, 'Maybe,' he says, 'the State may, when social conditions warrant, justifiably restrict *harijan* benefits to the *harijans* among the *harijans* and forbid the higher *harijans* from robbing the lowlier brethren.'² A much favoured device – pass the problem to someone else to tackle sometime in the indefinite future.

Justice Krishna Iyer presses the case. In fact, he says, the Scheduled Caste employees are more suitable for higher posts as they have experienced first-hand the privation that has to be eliminated; that experience is a much more reliable guide of suitability than the farce of examinations and assessments. Remember, the posts in question are in the Railways, the core function is to run trains. At the higher levels, the core

function is to run a huge organization, one of the largest in the world. But empathy it seems is what is needed!

‘The fundamental question arises as to what is “merit” and “suitability”,’ the judge says. ‘Elitists whose sympathies with the masses have dried up are, from the standards of the Indian people, least *suitable* to run Government and least *meritorious* to handle State business, if we envision a Service State in which the millions are the consumers. A sensitized heart and a vibrant head, tuned to the tears of the people, will speedily quicken the developmental needs of the country, including its rural stretches and slum squalor. Sincere dedication and intellectual integrity – these are some of the major components of “merit” and “suitability” – not degrees from Oxford or Cambridge, Harvard or Stanford or simian, though Indian, institutions’ – and the judge must have, we must assume, some empirical information to establish that those inducted through reservations have a greater degree of ‘sincere dedication and intellectual integrity’.

‘Unfortunately, the very orientation of our selection process is distorted and those like the candidates from the SC & ST who, from their birth, have had a traumatic understanding of the conditions of agrestic India have, in one sense, more capability than those who have lived under affluent circumstances and are callous to the human lot of the sorrowing masses,’ Justice Krishna Iyer concludes. We select persons through examinations, the judge laments, but the system of examinations is flawed: ‘Moreover, our examination system makes memory the master of “*merit*” and banishes creativity into exile.’ Again, there must be some empirical information that has led the judge to conclude that there is more creativity among those who come through reservations.

And then a typical deferment to the ‘brooding presence of the future’: ‘We need not enter these areas where a fundamental transformation and a radical reorientation even in the assessment of the qualities needed by the personnel in the Administration and the socialist values to be possessed by the echelons in office is a consummation devoutly to be wished. This may have to be subjected to a national debate.’

A much favoured device, that one: when the fact just cannot be denied, or the assertion cannot be substantiated, suggest a national debate in the future! And cast the shadow of doubt over the results of such system as we have till that debate is concluded!

But the judge is far from done. Excluding someone through these examinations, Justice Krishna Iyer declaims, is no different from the British excluding Gandhiji, Nehru, JP, Ambedkar: ‘The colonial hangover still clings to our selection processes with superstitious tenacity and narrower concepts of efficiency and merit are readily evolved to push out Gandhis and JPs, Ambedkars and Nehrus, to mention but a few who knew the heartbeats of the people.’

Is it that these personages were excluded by the British through some examinations, or that these persons decided not to sit for the exams and instead do something more than join government departments?

The judge couldn’t be bothered to pause and ask. He now sees opposition to his assertions as nothing but the age-old attempt of establishments to scotch every new idea:

I divagate and make these observations only to debunk the exaggerated argument about *harijans* and *girijans* being substandard. We may put aside this angle of vision and approach the problem traditionally because *every new idea* has resistance to encounter before acceptance, every original thought has been branded a heresy.³

The martyr standing up to vested interests and orthodoxy!

But by the orders that have been put in place – two-thirds of the vacancies to be reserved; unfilled vacancies to be carried over for three years; reservations in promotions also – it is entirely likely that in some years, 100 per cent of the openings shall be reserved, that general category employees shall be completely shut out; that *all* positions shall be filled on the basis of birth, and *none* on the basis of merit. Even if that were to happen, so what?, asks the judge:

It is true that Shri Venugopal, counsel for some of the petitioners tried to demonstrate that on account of reservation percentages coupled with the carry forward rule it is perfectly within the realm of possibility that in some years a monopoly may be conferred on the SC & ST candidates for certain categories or classes of posts. The mystic ‘maybes’ do not scare us. The actual ‘must bes’ will alert us. The Constitution deals with social realities, not speculative possibilities.⁴

Recall those verdicts we encountered earlier based on the two - speculatively possible – brothers!

In any case, as the government counsel has submitted, the judge records approvingly, birth pangs and ‘discriminatory unconstitutionality’ are inevitable in the short run:

...in a society of chronic inequality and scarcity of employment, actual equality could never be midwifed without birth pangs, and discriminatory unconstitutionality could not vitiate programmes meant to achieve real-life equality, unless we took a pragmatic view.⁵

He dismisses apprehensions about inefficiency with invective: the apprehensions that are being voiced are a ‘caricature’, he declares. ‘If *harias* were excluded would railway accidents have a long he demands. ‘Courts are not credulity in robes!’⁶

Counsel present a report of the Railways, they present newspaper items about accidents and the like. He dismisses these with scorn:

The furious charges of inefficiency in administration,

The arguments of the other become ‘furious charges’

injected by incompetence imported through SC & ST candidates and by frustration and demoralisation of the non-SC & ST members who were passed over by their less competent juniors, was sought to be supported by reliance on the report of the Railway Accidents Enquiry Committee, 1968. There was reference in it to discontent among supervisors *inter alia* on account of the procedure of reservation of posts for SC & ST. It is true that the Report has a slant against the SC & ST promotion policy

The finding of the Enquiry Committee becomes ‘a slant against...’

notwithstanding the assurance given by the Railway Board to the Committee that instructions had been issued not to relax standards in favour of SC & ST members where safety was involved.

And now see how the judge disposes of empirical material that has been placed before the court:

We need hardly say that it is straining judicial gullibility to breaking point to go that far. This is an *argumentum ad absurdum* though urged by petitioners with hopeful ingenuity.

Not a word, not the shred of a fact that would show that the findings of the report cannot be relied upon. Instead, the dismissal – that to ask us to believe the report of the experts ‘is straining judicial gullibility to breaking point,’ it ‘is an *argumentum ad absurdum*’. How is it either? On the contrary, are the assertions of the judge not the ones that strain our gullibility to breaking point?

‘Nor are we concerned with certain newspaper items and representations about frustration and stagnation,’ Justice Krishna Iyer says. This from a judge who was of the group that revelled in taking *suo moto* account of newspaper reports, and converting letters into writs!

‘Surely, extraneous factors, however passionately projected, cannot shake or shape judicial conclusions which must be founded on constitutional criteria and relevant facts only.’⁷ How are findings of experts appointed to inquire into accidents *irrelevant*? How are newspaper reports that deal with the issue at hand *irrelevant*? As for extraneous factors not shaking judicial conclusions, recall the sensitivity and alertness with which the judge took account of them when Mrs Indira Gandhi came to him for staying the operation of the Allahabad High Court judgment.

Next, Justice Krishna Iyer maintains, the new relaxations are just a little more of what has already been accepted in the past:⁸ The circulars in question provided that if a Scheduled Caste or Tribe employee is graded ‘good’, that grading shall be treated as ‘Very Good’; if he is graded as ‘Very Good’, that assessment shall be treated as ‘Outstanding’. That is no big deal, declares the judge:

Annexure ‘H’ is bad for unconstitutionality according to the petitioners for many reasons. For one thing, an SC/ST employee gets one grading higher than otherwise assignable to him on the record of his service. So much so, if he is ‘good’ he will be categorised as ‘very good’. This fiction or fraud in grading is said to be a vice rendering the promotional prospects unreasonable. We do not agree. Superficially viewed, this clumsy process of reclassifying ability may strike one as disingenuous. Of course, this concession is confined to only 25 per cent [*‘only 25 per cent’!*] of the total number of vacancies in a particular grade or post filled in a year. So there is no rampant vice of *every harijan* or *girijan* jumping over the heads of others.

Would the effect on administration become ‘a vice’ only when ‘*every harijan* or *girijan* jumps over the heads of others’?

More importantly, we think this is only an administrative device of showing a concession or furtherance of prospects of selection. Even as under Article 15(4) and Article 16(4) lesser marks are prescribed as sufficient for SCs & STs or extra marks are added to give them an advantage, the regrading is one more method of boosting the chances of selection of these depressed classes. There is nothing shady about it.

Is the effect on administration any the less if the dilution of standards is open, in full light than if it is shady?

If there is advancement of prospects of SC & ST by addition of marks or prescribing lesser minimum marks or by relaxing other qualifications, I see no particular outrage in re-categorisation which is but a different mode of conferring an advantage for the plain and understandable reason that SCs & STs do need some extra help. It is important to note that the prescribed minimum qualifications and standards of fitness are continued even for SCs & STs under Annexure 'H'.⁹

The judge had been emphatic in *N.M. Thomas* about how benefits of reservations are being monopolized by the better off among the categories for which reservations have been provided. He declared with great force that this neutralized and defeated the very purpose of reservations. Now, as we noticed in passing earlier when we considered his ringing pronouncements in *N.M. Thomas*, the same judge dismisses the same fact with a shrug:

Maybe, some of the forward lines of the backward classes have the best of both the worlds and their electoral muscle *qua* caste scares away even radical parties from talking secularism to them. We are not concerned with that dubious brand. In the long run, the recipe for backwardness is not creating a vested interest in backward castes but liquidation of handicaps, social and economic, by constructive projects. All this is in another street and we need not walk that way now.¹⁰

Three favoured devices there: dismiss the matter as pertaining to a few deviant – ‘We are not concerned with that dubious brand’; push it aside for some future occasion – ‘All this is in another street and we need not walk that way now.’ And pass the task on to someone else:

The argument is that there are rich and influential *harijans* who rob all the privileges leaving the serf-level sufferers as suppressed as ever. The Administration may well innovate and classify to weed out the creamy layer of SCs/STs but the court cannot force the State in that behalf.¹¹

This from an activist judge who delighted in ‘forcing the State’ to do many a thing!

But isn’t all this based on nothing but ‘caste’? The Scheduled Castes are not ‘*castes*’, Justice Krishna Iyer maintains. Indeed, he extrapolates and in three steps comes close to pronouncing that the ‘backward castes’ aren’t castes either! Scheduled Castes are not *castes* – that is the first step; Scheduled Tribes aren’t *castes* in any case – that is the second step, though the point has nothing to do with the assertion that preceded or succeeds the truism; and, therefore, those classified as ‘Other Backward Classes’ aren’t *castes*! This is how his logic runs:

Terminological similarities are an illusory guide and we cannot go by verbal verisimilitude. It is very doubtful whether the expression caste will apply to Scheduled Castes. At any rate, Scheduled Tribes are identified by their tribal denomination. A tribe cannot be equated with a caste. As stated earlier, there are sufficient indications in the Constitution to suggest that the Scheduled Castes are not mere castes. They may be something less or something more and the time badge is not the fact that the members belong to a caste but the circumstance that they belong to an indescribably backward human group. Ray, C.J., in *Kerala v. Thomas* made certain observations which have been extracted earlier to make out that ‘Scheduled Castes and Scheduled Tribes are not a caste within the ordinary meaning of caste’. Since a contrary view is possible and has been taken by some Judges a verdict need not be rested on the view that SCs are not castes...’¹²

*The successor progressive finds the preceding
one to have been insufficiently committed*

Justice O. Chinnappa Reddy cites these words and propositions in justification for enlarging the claims of reservationists, only to chastise them as insufficient, as smacking of apologia. In *Vasanth Kumar*, he says:

While we agree that competitive skill is relevant in higher posts, we do not think it is necessary to be apologetic about reservations in posts, higher or lower, so long as the minimum requirements are satisfied. On the other hand, we have to be apologetic that there still exists a need for reservation. Earlier we extracted a passage from Tawney’s *Equality* where he bemoaned how degrading it was for humanity to make much of their intellectual and moral superiority to each other...¹³

Members of Scheduled Castes and Tribes, other constituents of ‘weaker sections of the people’ have long journeys to make, Justice O. Chinnappa Reddy reminds us in *Vasanth Kumar*. He warns: ‘The days of Dronacharya

and Ekalavya are over....' Who was resting his case on the assertion that the days of Dronacharya and Ekalavya are still around? But how could any of that detain a progressive? The cliché allusion hurled, it is time for the next invective.

And that is not long in coming! The judge castigates fellow judges for their 'superior, elitist, patronizing, paternalistic' approach to the question of reservations. And, on his reading, this superior, paternalistic, patronizing attitude has nothing to do with the merits of the matter, nothing to do with what the country requires, nothing to do even with law. It is rooted in and is nothing but an expression of the fact that those who advance arguments such as merit and efficiency are persons from one side of the 'real conflict'.

'One of the results of the superior, elitist approach,' Justice O. Chinnappa Reddy declares in *Vasanth Kumar*, 'is that the question of reservation is invariably viewed as the conflict between the meritarian principle and the compensatory principle. No, it is not so. The real conflict is between the class of people, who have never been in or who have already moved out of the desert of poverty, illiteracy and backwardness and are entrenched in the oasis of convenient living and those who are still in the desert and want to reach the oasis'¹⁴ -presumably, among this 'class of people who have never been in or who have already moved out of the desert of poverty, illiteracy and backwardness and are entrenched in the oasis of convenient living' are Justice Chinnappa Reddy's fellow judges, including judges on the same bench for some of them advance considerations of merit and efficiency in this very case!

Zero sum

Occasionally, even a progressive acknowledges that the real solution is faster growth. But his prescription suggests that such passages are just a verbal nod. Having held that apprehensions about standards falling are just 'merit-mongering' by those whose personal interests are liable to be affected; having legitimized reservations of two-thirds of vacancies in higher posts on the ground that these are not 'considerably in excess of 50 per cent'; having insisted that the only way to secure the economic interests of the Scheduled Castes and Tribes is to give them a share in posts of the state, to give them a share of power, that the only way to give them a share

in power is to give them a proportion not considerably in excess of 50 per cent in the higher posts of the state apparatus, Justice Krishna Iyer says that the real solution is growth, that is to enlarge the size of the cake! The ‘chronic drought of employment opportunities despite talent enough to make deserts bloom,’ he says, leads to the tragic result: ‘The vast human potential of the *harijans* and *girijans*, one-fifth of the Indian people, goes to thistles and every communal effort to twist the politics of power for promoting chances of getting jobs becomes inevitable, caste being a deep rooted pathology in our country.’ ‘Thus jobbery, politics, casteism and elections make an unholy, though invisible, alliance against national development which alone can liberate Indians from social and economic privation. If democracy itself thus plays into the hands of hostile forces, the jurisprudence of keeping the backward as backward and perpetuation of discrimination as a vested caste right may prevail as a rule of life.’

While the whole tenor of his judgment is doing precisely that, Justice Krishna Iyer warns, ‘The remedy of “reservations” to correct inherited imbalances must not be an overkill. Backward classes, outside the Scheduled Castes and Tribes, cannot bypass Article 16(2) save where very substantial cultural and economic disparity stares at society’ – compare these words with what the same judge says elsewhere on this very point. “The dubious obsession with ‘backwardness’ and the politicking with castes labelled backward classes may, on an appropriate occasion, demand judicial examination. The politics of power cannot sabotage the principles of one man, one value.’

So, what is the remedy? ‘We need now, not stagnation wearing the mask of stability and scrambling acrimoniously over the same shrunken cake, but progress by the constructive process of explosive rural development and exploitation of the untapped human potential of the Scheduled Castes and Scheduled Tribes. Sterile “reservations” will not help us go ahead unless, alongside of it, we have heroic national involvement of the masses in actual action, not paper-logged plan exercises. In the last analysis, privation can be banished only by production, discontent by distributive justice and litigation by socially relevant justice. The writ petitions are, regrettably, negative, although the driving force of penury deserves sympathy. This, perhaps, is a

materialist interpretation of “service litigation” and a grim footnote to these writ petitions.’¹⁵

That compliment to his construction apart – ‘this, perhaps, is a materialist interpretation of “service litigation”’ – till these passages, the judge has been eloquent on the other side of the ‘real conflict’!

It isn’t just that in this very judgment, Justice Krishna Iyer endorses dilution of standards; reservations of 66 2/3 per cent; reservations not just at entrance but in promotions; reservations in promotions not just at lower levels but in the higher posts too; he goes further and, in a judgment of the Supreme Court, exhorts caste group – the Scheduled Castes and Tribes on the one hand and the Backward Castes on the other – to forge alliances so that they may jointly wrest what is on offer!

‘Our founding fathers, familiar with social dialectics and socialist enlightenment, surely would have intended to bring both these have-not categories together as a broad brotherhood against the die-hard establishment and would never have contemplated a fratricidal strategy which would blind and divide brothers in distress – the *dalits* and the *soshits* – and harm the integration of the nation and its developmental march,’ the judge says. ‘Unless by dialectical approach sociologists lay bare this false dilemma of *dalits* versus *soshits*, the growing distrust in democracy will deepen, the jurisprudence of constitutional revolution and egalitarian justice will fade in the books and the founding hopes of January 26, 1950, will sour into cynical dupes of the masses, decades after.’

He returns to this exhortation as he closes his judgment. ‘The economically backward and the socio-economically backward truly belong to the “have-not” camp and *must jointly act to bring about a transformation of the economic order* by putting sufficient pressure and make Article 38 a living reality,’ Justice Krishna Iyer exhorts. ‘Estrangement between the two categories *weakens the militancy of a joint operation* to inject social justice in the current economic order... Even Administration will do well to remember that Indian despair, after infinite patience, may augur danger unless “the sorry scheme of things entire” is remoulded nearer to Article 38.’¹⁶

Justice Reddy has no patience for the chimera that the solution may lie in faster growth. “There is not enough fruit in the garden and so those who

are in, want to keep out those who are out,' he declares. We should pause a moment, and read that again – 'There is not enough fruit in the garden and so those who are in, want to keep out those who are out.' This is precisely the fatuous zero-sum notion which held India back for thirty year – that it is not possible for all to grow together, that the quantum of fruit is fixed, that, therefore, if one set gets more, the other set will inevitably get less.

And Justice Reddy has more to say: 'The disastrous consequences of the so-called meritarian principle to the vast majority of the undernourished, poverty-stricken, barely literate and vulnerable people of our country are too obvious to be stated' – another favourite device: when you cannot adduce evidence to substantiate your assertion, declare that the proposition is too obvious to need substantiation!

But that is just the opening salvo.

In any case, what is 'merit'?

‘And, what is merit?’, Justice O. Chinnappa Reddy asks in words that will be picked up by an opportunist and unnerved politician later, and the words of that politician will in turn be echoed by another judge of the Supreme Court. Talk of creating an ‘echo effect’!

‘There is no merit in a system which brings about such consequences,’ he says. ‘Is not a child of the Scheduled Castes, Scheduled Tribes or other backward classes who has been brought up in an atmosphere of penury, illiteracy and anti-culture, who is looked down upon by tradition and society, who has no books and magazines to read at home, no radio to listen, no TV to watch, no one to help him with his home work, who goes to the nearest local board school and college, whose parents are either illiterate or so ignorant and ill-informed that he cannot even hope to seek their advice on any matter of importance, a child who must perforce trudge to the nearest public reading room to read a newspaper to know what is happening in the world, has not this child got merit if he, with all his disadvantages is able to secure the qualifying 40 per cent or 50 per cent of the marks at a competitive examination where the children of the upper classes who have all the advantages, who go to St. Paul’s High School and St. Stephen’s College, and who have perhaps been specially coached for the examination may secure 70, 80 or even 90 per cent of the marks? Surely, a child who has been able to jump so many hurdles may be expected to do better and better as he progresses in life.’ ‘If spring flower he cannot be, autumn flower he may be,’ the judge says. ‘Why then, should he be stopped at the threshold on an alleged meritarian principle?’

Is there no way out? Is this justice? ‘The requirements of efficiency may always be safeguarded by the prescription of minimum standards.

Mediocrity has always triumphed in the past in the case of the upper classes. But why should the so-called meritarian principle be put against mediocrity when we come to Scheduled Castes, Scheduled Tribes and backward classes?’¹

That a person who is assigned a job has grown up in difficult circumstances does not make the work that has to be completed easier. That a person has the potential to acquire the necessary skills in the future, that there is the possibility that he will bloom in autumn, does not help when the work has to be done here and now. And when this is said, it is not in any way any verdict on some ‘intrinsic worth of the person as a human being’; it is not any judgement about the heights that the person can or cannot climb eventually. It is just an assessment about the point at issue: who has the attributes here and now to do the job that has to be done here and now? This much must have been obvious to the judge, for he escapes into grandiloquence, to put it no higher. This is the *only* point at issue at that moment. The judge-advocate of reservations *evades* the issue by making out that the one raising the question is actually, deep down convinced that the candidate is of little worth as a human being; he is convinced that, do what the person might, he will just not be able to scale the necessary heights ever...

‘Efficiency is very much on the lips of the privileged whenever reservation is mentioned,’ declares Justice Reddy. ‘Efficiency, it seems, will be impaired if the total reservation exceeds 50%; efficiency, it seems, will suffer if the “carry forward” Rule is adopted; efficiency, it seems, will be injured if the Rule of reservation is extended to promotional posts. From the protests against reservation exceeding 50% or extending to promotional posts and against the carry forward rule, *one would think that the civil service is a Heavenly Paradise into which the archangels, the chosen of the elite, the very best may enter and may be allowed to go higher up the ladder.*’

But does the reasoning not go the other way? Had the civil service been Heavenly Paradise, it could not have suffered much from the induction of a few less-than-archangels. It is precisely because it is just another tenuous human institution that it cannot survive dilution of standards.

‘But the truth is otherwise,’ the judge continues. ‘The truth is that the civil service is no paradise and the upper echelons belonging to the chosen classes are *not necessarily* models of efficiency.’

Notice two points: first the ‘not necessarily’; second, the operational proposition the judge is advancing – as the ‘chosen classes’ in the ‘upper echelons’ are ‘not necessarily’ ‘models of efficiency’, the overall quality of the service will not suffer if another lot that is below par is inducted into it!

Next come another ‘not necessarily’, a deft sleight of words, and more invective.

‘The underlying assumption,’ the judge asserts, ‘that those belonging to the upper castes and classes, who are appointed to the non-reserved posts will, because of their presumed merit, ‘naturally’ perform better than those who have been appointed to the reserved posts and that the clear stream of efficiency will be polluted by the infiltration of the latter into the sacred precincts is a vicious assumption, typical of the superior approach of the elitist classes.’

Pause for a moment, and read that sentence again: ‘*presumed* merit’, ‘*“naturally”* perform better’, ‘clear stream of efficiency will be *polluted*’, ‘sacred precincts’, on the one side; and ‘*infiltration*’, ‘*vicious assumption typical of the superior approach of the elitist classes*’, on the other. An objective judge with an open mind?

‘There is neither statistical basis nor expert evidence to support these assumptions that efficiency will *necessarily* be impaired if reservation exceeds 50%, if reservation is carried forward or if reservation is extended to promotional posts.’ As it may not be ‘necessarily’ impaired, it will not be impaired! Q.E.D.

‘Arguments are advanced and opinions are expressed entirely on an *ad hoc* presumptive basis,’ says the judge. What else is he himself doing in the passage? ‘The age long contempt with which the “superior” or “forward” castes have treated the “inferior” or “backward” castes is now transforming and crystallizing itself into unfair prejudice, conscious and subconscious, ever since the “inferior” castes and classes started claiming their legitimate share of the cake, which naturally means, for the “superior” castes, parting with a bit of it.’ Does the allegation that the argument is born of nothing but ‘age long contempt’, of ‘unfair prejudice’ not itself smack of ‘unfair prejudice’, conscious rather than subconscious, if I may add? And what is

the ‘empirical evidence’ which shows that giving some of ‘the cake’ to one section must ‘necessarily’ entail that others have to ‘part with a bit of it’?

‘Although in actual practice their virtual monopoly on elite occupations and posts is hardly threatened, the forward castes are nevertheless increasingly afraid that they might lose this monopoly in the higher ranks of government service and the professions,’ the judge continues. What is the ‘statistical basis’ or ‘expert evidence’ ‘to support these assumptions’ of the judge about the fear that he says has gripped the forward castes? Is he not burying arguments that he finds inconvenient by pasting motives on others?

‘It is so difficult for the “superior” castes,’ the judge continues, ‘to understand and rise above their prejudice, and it is so difficult for the inferior castes and classes to overcome the bitter prejudice and opposition which they are forced to face at every stage.’

‘Always one hears the word “efficiency” as if it is sacrosanct and the sanctorum has to be fiercely guarded,’ Justice Reddy declares. ‘*Sacrosanct*’, ‘*sanctorum*’? That is a gross caricature of the proposition that in reserving half the posts in civil services and allotting them on the basis of birth, the state must pay heed to the effects that such reservation shall have on the efficient functioning of institutions. To insinuate that anyone who talks of preserving the efficiency of government service is making it out to be ‘sacrosanct’, that he is elevating it into a ‘sanctorum’ is to assert that he is making out that efficiency alone matter – to the exclusion of other values, like justice. If that be the case, what should one say about the Constitution itself, and its framers? After all, in Article 335, it says, “The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, *consistently with the maintenance of efficiency of administration*, in the making of appointments to services and posts in connection with the affairs of the Union or of a state.’ In laying this down, is the Constitution itself guilty of ‘prejudice’? Were framers of the Constitution also in the grip of dread that the lower castes would eat up the cake? Are Article 335, and the prudence underlying it, also ‘a vicious assumption typical of the superior approach of the elitist classes’? Are they also instances of ‘the age-long contempt with which the “superior” or “forward” castes have treated the “inferior” or “backward” castes’?

“Efficiency” is not a *mantra* which is whispered by the Guru in the *Sishya*’s ear,’ scoffs the judge. But who says it is?

And then follows a truism – with that precautionary ‘necessarily’ thrown in – of the kind we encounter in several other judgments also of this genus. ‘The mere securing of high marks at an examination *may not necessarily* mark out a good administrator’ – with that the fact that persons who have scored much higher marks in the competitive examinations are ever so often denied entrance even as persons with much, much lower marks get admissions and appointments is disposed. We shall examine this proposition as we proceed, but a tiny question is in order even at this stage. If marks in examinations are so unreliable a guide as between non-SC/ST/OBC candidates on the one hand and SC/ST/OBC candidates on the other, how come they are accepted *within* the reserved categories? After all, at some cut-off point some members of the SC/ST/OBC are denied entrance – and they are denied entrance solely because they have not scored marks in the examination above that cut-off point. Indeed, when they are asserting that reservations will not lower efficiency, these very judges assert that the SC/ST/OBC candidates have to go through ‘fierce competition’ vis-à-vis other SC/ST/OBC candidates. Surely, that ‘fierce competition’ takes place through these very tests, and the candidates are judged by the same yardstick – of marks scored in these tests. In view of what the judge says, is that defensible? May it not be that by this ‘arbitrary’ rule we are excluding a truly gifted administrator?

Justice Chinnappa Reddy follows this assertion by the usual empathy premise. An efficient administrator, one takes it,’ says the judge, ‘must be one who possesses among other qualities the capacity to understand with sympathy and, therefore, tackle bravely the problems of a large segment of the population constituting the weaker sections of the people. And who better than the ones belonging to those very sections?’ How many cases can the judge point to of officers ‘belonging to those very sections’ who did exceptional work for the weaker sections? The more conspicuous case – of officers in UP and Bihar who came from among the reservationists and were as corrupt and self-seeking as others; of politicians of these and other states who rode to power as messiahs of ‘those very sections’ – certainly do not bear out the judge’s assertion.

‘Why not ask ourselves why 35 years after Independence, the position of Scheduled Castes, etc. has not greatly improved?’, demands the judge. In fact, the position *has* greatly improved. But if, as the judge maintains, the

position of the Scheduled Castes and Tribes has ‘not greatly improved’, why not turn the question around, and ask why, after fifty years of progressively higher reservations, the position of Scheduled Castes and Tribes has not improved more than it has?

‘Is it not a legitimate question to ask,’ the judge demands, ‘whether things might have been different, had the District Administrators and the state and Central bureaucrats been drawn in larger numbers from these classes?’ Could it not be the other way? That the position of *all sections* – including these section – would have been much, much better, had administrators been selected and posted and promoted, not because of their birth but strictly on merit? If the entire administrative structure had been steered not into these ditches – of jobs and promotions as matters of right, as entitlement – but towards accountability and performance?

Having characterized merit and efficiency in these terms, the judge seems to hedge a bit – but he carefully chooses words that only darken the characterization. He says, ‘We do not mean to say that efficiency in the civil service is unnecessary or that it is a myth. All that we mean to say is that *one need not make a fastidious fetish of it...* We do not, therefore, mean to say that efficiency is altogether discounted. All that we mean to say is that *it cannot be permitted to be used as a camouflage to let the upper classes in its name monopolize the services, particularly the higher posts and the professional institutions.* We are afraid we have to rid our minds of many cobwebs before we arrive at the core of the problem. The quest for equality is self-elusive, we must lose our illusions, though not our faith. It is the dignity of man to pursue the quest for equality.’

The net effect of his peroration is obvious: anyone talking of merit and efficiency has to establish that he is not making ‘a fastidious fetish’ of it, that he is not assisting the ‘upper classes’ perpetuate their monopoly of higher posts and professional institutions; on the other hand, anyone berating efficiency and merit, in particular anyone denouncing them on the grounds that they have become ‘a fastidious fetish’, that they are being used as an instrument for perpetuating upper-caste monopolies is naturally speaking up for the dispossessed! At the least, the former is still a prisoner of illusions, his mind is still enmeshed in cobwebs, he has still not reconciled himself to the dignity of every man!²

The same arguments get repeated in judgment after progressive judgment. With a new quotation or two thrown in from time to time. In *Indra Sawhney*, Justice P.B. Sawant comes down heavily on the argument that merit will be compromised by reservations. He starts by invoking a passage from Panditji's *Discovery of India*. He quotes Panditji to have written:

Therefore, not only must equal opportunities be given to all, but special opportunities for educational, economic and cultural growth must be given to backward groups so as to enable them to catch up with those who are ahead of them. Any such attempt to open the door of opportunities to all in India will release enormous energy and ability and transform the country with amazing speed.

This is not the place for an exegesis of Panditji's views on the matter. But five points are in order even in regard to this brief passage. First, notice that in it Panditji is urging that '*opportunities*' be opened to all, that 'equal opportunities be given to all' and not that outcomes be 'equalized' by excluding the meritorious from those opportunities. Second, he advocates that 'special opportunities' be given to those who have been left behind, not exclusive opportunities through a device such as reservations. Third, the object that he wants to attain through these 'special opportunities' is '*to enable them to catch up with those who are ahead of them,*' not to enable them to dodge standards that are necessary for executing the work at hand. Fourth, in this passage, Panditji is advocating 'special opportunities for educational, economic and cultural growth'; how does it become an argument for reservations in government services? Finally, if it is all right to invoke a passage that does not talk of reservations from the *Discovery of India* written in the mid-1940s, why not heed what he wrote at his height as prime minister in 1961 on reservations directly?

But, of course, the progressive judge is not to be deterred by such considerations. He is on to compassion, and more. Justice Sawant continues, 'The inequalities in Indian society are born in homes and sustained through every medium of social advancement. Inhuman habitations, limited and crippling social intercourse, low-grade educational institutions and degrading occupations perpetuate the inequities in myriad ways.' Why not then address these handicaps? Why not improve habitations? Why not multiply high-grade educational institutions? Why not

clean up occupations, and trigger new ones? But the judge is on to other things.

First comes the relative weight of identical attainments: ‘Those who are fortunate to make their escape from these all-pervasive dragnets by managing to attain at least the minimum of attainments in spite of the paralysing effects of the debilitating social environment, have to compete with others to cross the threshold of their backwardness.’ And with that we are back to practice. The judge asks, as did Justice Chinnappa Reddy, Are not those attainments, however low by the traditional standards of measuring them, in the circumstances in which they are gained, more creditable? Do they not show sufficient grit and determination, intelligence, diligence, potentiality and inclination towards learning and scholarship?’

Next comes the question of elementary fairness: ‘Is it fair to compare these attainments with those of one who had all the advantages of decent accommodation with all the comforts and facilities, enlightened and affluent family and social life, and high quality education? Can the advantages gained on account of the superior social circumstances be put in the scales to claim merit and flaunted as fundamental rights?’

Then, the hypothetical: ‘May be in many cases, those coming from the high classes have not utilised their advantages fully and their score, though compared with others, is high, is in fact not so when evaluated against the backdrop of their superior advantage – may even be lower. With the same advantages, others might have scored better.’

Then, the conclusive example: ‘In this connection, Dr Ambedkar’s example is worth citing. In his matriculation examination, he secured only 37.5% of the marks, the minimum for passing being 35%. (See *Dr Ambedkar* by Dr Dhananjay Keer). If his potentialities were to be judged by the said marks, the country would have lost the benefit of his talent for all times to come.’

From the example, the judge proceeds to generalize, and berate assessment yardsticks in general – without, as is customary, taking the trouble, in this judgment or elsewhere, to work out the alternative yardstick. ‘Those who advance merit contention, unfortunately, also ignore the very basic fact,’ the judge writes, ‘(though in other contexts, they may be the first to accept it) – that the traditional method of evaluating merit is neither scientific nor realistic. Marks in one-time oral or written test do not

necessarily prove the worth or suitability of an individual to a particular post, much less do they indicate his comparative calibre. What is more, for different posts, different tests have to be applied to judge the suitability.'

And then, à la Krishna Iyer, there is the difference between competence and suitability: 'The basic problems of this country are mass oriented,' Justice Sawant says. 'India lives in villages, and in slums in towns and cities. To tackle their problems and to implement measures to better their lot, the country needs *personnel who have first-hand knowledge of their problems and have personal interest in solving them. What is needed is empathy and not mere sympathy.* One of the major reasons why during all these years after Independence, the lot of the downtrodden has not even been marginally improved and why majority of the schemes for their welfare have remained on paper, is perceptibly traceable to the fact that the implementing machinery dominated as it is by the high classes, is indifferent to their problems...'³

The analogy from teaching

Proceed for a moment to what Justice Sawant himself holds in the same judgment in regard to the teaching profession. The judge holds, 'It is worth serious consideration whether reservations in the form of preference instead of exclusive quota should not be resorted to in the teaching profession in the interests of the backward classes themselves.' Read the reasons he gives for this, and as you do so, ask whether the exact words do not apply with equal force to general governance and administration. Justice Sawant tells us:

Education is the source of advancement of the individual in all walks of life.

And so is general governance – as the people of UP and Bihar and Jharkhand, swept into an abyss on casteist slogans, are surely realizing today.

The teaching profession, therefore, holds a key position in societal life. It is the quality of education received that determines and shapes the equipment and the competitive capacity of the individual, and lays the foundation for his career in life.

The quality of general governance, the proper functioning of institutions ‘holds a key position in societal life’. It is the quality of governance that ‘determines and shapes the equipment and the competitive capacity’ not just of the individual but of the entire country, and ‘lays the foundation’ for its future life.

It is, therefore, in the interests of all sections of the society – socially backward and forward – and of the nation as a whole, that they aim at securing and ensuring the best of education.

Exactly so: ‘It is, therefore, in the interests of all sections of the society – socially backward and forward – and of the nation as a whole, that they aim at securing and ensuring the best of administration.

The student whether he belongs to the backward or forward class is also entitled to expect that he receives the best possible education that can be made available to him and correspondingly it is the duty and the obligation of the management of every educational institution to make sincere and diligent efforts to secure the services of the best available teaching talent.

Precisely: “The citizen whether he belongs to the backward or forward class is also entitled to expect that he receives the best possible governance that can be made available to him and correspondingly it is the duty and the obligation of the management of every institution to make sincere and diligent efforts to secure the services of the best available administrative talent.’

In the appointments of teachers, therefore, there should be no compromise on any ground.

Indeed: ‘In the appointments of administrators, therefore, there should be no compromise on any ground.’

For as against the few who may get appointments as teachers from the reserved quota, there will be over the years thousands of students belonging to the backward classes receiving education whose competitive capacity needs to be brought to the level of the forward classes. What is more, incompetent teaching would also affect the quality of education received by the students from the other sections of the society. However, whereas those coming from the advanced sections of the society can make up their loss in the quality of education received, by education at home or outside through private tuitions and tutorial classes, those coming from the backward classes would have no means for making up the loss. The teachers themselves must further command respect which they will do more when they do not come through any reserved quota. The

indiscipline in the educational campus is not a little due to the incompetence of the teachers from whatever section they may come, forward or backward. It is, therefore, necessary that there should be no exclusive quota kept in the teaching occupation for any section at all.

Just substitute ‘citizens’ for ‘students’; and ‘administrators’, or ‘ministers’ for that matter, for ‘teachers’ and see how apposite the judge’s counsel is for our country! Right to the point that when standards in the police collapse, the rich can make their private arrangements for security, the dispossessed are the ones who are left completely exposed to every rogue.

The judge then proceeds to prescribe that preference be shown to persons from backward castes provided they have the same qualifications as candidates from forward castes; and that to ensure this preference, we should ensure both that the methods of evaluation are ‘not the traditional test of marks but a scientific test based, among other things, on the aptitude in teaching, the capacity to express and convey thoughts, the scholarship, the character of the person, his interest in teaching, his potentiality as a teacher...,’ and also that members of backward castes are in the selection committees that will evaluate the candidates.⁴

We can be confident that any comparable list of ‘aptitude’, ‘character’, ‘capacity’, etc., that is drawn up to assess administrators will be rejected by the judge for its failure to assign sufficient weight to the fact that only those who have first-hand experience of the problems of the backward can have the capacity and commitment to work for the backwards! Empathy is necessary in administration. Not in education!

Justice T.K. Thommen takes the matter beyond caste. His enumeration, born out of as much empathy, while vaulting us over one problem, lands us in another. He declares, ‘The city slum dwellers, the inhabitants of the pavements, afflicted and disfigured in many cases by diseases like leprosy, caught in the vicious grip of grinding penury, and making a meagre living by begging besides the towering mansions of affluence, transcend all barriers of religion, caste, race, etc. in their degradation, suffering and humiliation.’ A good, non-casteist, secular enumeration. Then, the grandiloquence: ‘They are the living monument of backwardness and a shameful reminder of our national indifference, a cruel betrayal of what the Preamble to the Constitution proclaims.’ And from that to the policy

prescription: ‘No matter what caste or religion they may claim, *their present plight of animal like existence, living on crumbs picked from garbage cans or coins flung from moving car – a common painful sight in our metropolis – entitles them to every kind of affirmative action to redeem themselves from the iniquities of past and continuing discrimination.*

⁵

Hence, they have an *entitlement*. Second, the criterion that qualifies them for the entitlement is ‘their present plight of animal like existence, living on crumbs picked from garbage cans or coins flung from moving cars.’ Third, to what does their animal-like existence entitle them? To ‘every kind of affirmative action to redeem themselves from the iniquities of past and continuing discrimination’.

Now, the tenor of all these judgments has been that the one kind of affirmative action which will ‘redeem them from the iniquities of past and continuing discrimination’ is that half the jobs in government be reserved for them. Imagine what the condition of administration will be when half the posts are manned by ‘the city slum dwellers, the inhabitants of the pavements, afflicted and disfigured in many cases by diseases like leprosy,’ etc., and when these are given to them only because they are caught in ‘animal like existence, living on crumbs picked from garbage cans or coins flung from moving cars’. No one will quarrel with the judge’s admonition that the state must take steps for their ‘rehabilitation and resettlement’, for providing them education, health care and the like. The point at issue is ‘all kinds of affirmative action’ which in these judgments have been taken to imply primarily that half the jobs at all levels in government must be kept aside for the categories specified by the concerned authorities.

Opportunism as principle

In any case, why should we be concerned with merit and efficiency of individuals at all? When the whole system is without merit, what is the point in demanding efficiency and merit of individuals? In fact, to demand that they be efficient in serving a system that itself deserves to be overthrown is to demand that they perpetuate a perversity. That is not some maniacal extremist speaking. That is what the Supreme Court has held time and again. And for buttressing its assertions in this regard, it has taken recourse to the rhetoric of one of the most opportunist of politicians we

have had in the last half-century. V.P. Singh had got frightened when the person he had just dismissed from deputy prime ministership announced that he would hold a rally in Delhi's Vijay Chowk. Frightened, he lunged for the Mandal Commission report, and announced an avalanche of additional reservations. As was typical of him, he elevated his opportunism to principle. Speaking in Parliament, he declared:

We talk about merit. What is the merit of the system itself? That the section which has 52% of the population gets 12.55% in Government employment. What is the merit of the system? That in Class I employees of the Government it gets only 4.69%, for 52% of the population in decision-making at the top echelons it is not even one-tenth of the population of the country; in the power-structure it is hardly 4.69. I want to challenge first the merit of the system before we come to the question on the merit, whether on merit to reject this individual or that. And we want to change the structure basically, consciously, with open eyes. And I know, when changing the structures, there will be resistance...

That was opportunism at its apogee – he had not challenged it till then in his long career! But it is this passage that is quoted with manifest approval by an activist judge – in *Indra Swahney*!⁶

As further authority, Justice Jeevan Reddy cites Justice Chinnappa Reddy – the peroration that we have already encountered about how the ‘real conflict’ is between those ‘who have never been in or who have already moved out of the desert of poverty illiteracy and backwardness and are entrenched in the oasis of convenient living and those who are still in the desert and want to reach the oasis,’ about how there just isn't enough fruit in the garden so that if one set gets more, the other will necessarily be deprived of that portion.

Article 16(4) is not a poverty alleviation programme, Justice P.B. Sawant pronounces. Its aim is not economic upliftment. Its singular aim is to redistribute power to those who have been kept out of the state apparatus, and, through that redistribution, to end their educational, social and economic backwardness.⁷ And this class, Justice Sawant asserts, is not less than 77 1/2 per cent of the population of the country.

One has but to formulate the matter in such terms and two inconveniences jut out. First, given universal adult franchise, given the way caste-based political parties have captured power in state after state, given the decisive sway they have acquired over the Centre, given that the

backwards are 77 per cent and more of the population, will power not automatically get redistributed towards them? In fact, isn't power already being redistributed towards them? Take the index of which the Mandal Commission made so much. The Commission contrasted the politics of the southern states and those of the north. It set out how high-caste chief ministers and cabinets had been replaced by ministers and chief ministers from the lower castes in the former but not in the latter.⁸ Today, that goal has been accomplished in the north too. Indeed, the central Parliament is dominated by and shoved and pushed by those who speak in the name of the backwards. Its standard – of functioning, of what passes for discourse – too have been brought down to what these caste leaders had wrought in the state legislatures.

If only these commissions were to teach our people to look at the character of a person as a chief minister or minister rather than at his caste character, we would be saved from the abyss into which we are being pushed. But that apart, as the project of transferring power is well on the way to being accomplished, why does the additional instrument of reservations need to be continued?

The progressive judge shifts immediately to another tack. By itself, political power does not bring real power, he suddenly maintains. Political power has to be actually exercised to banish the disadvantages and backwardness of socially, educationally and economically deprived sections. And there lies the rub. 'The only known medium of exercising the power is the administrative machinery,' the judge states. 'If that machinery is not sympathetic to the purpose of the exercise, the political power becomes ineffective, and at times is also rendered impotent. The reason why, after forty-four years of Independence and of vesting of political power in the hands of the people, the same section which dominated the nation's affairs earlier, continues to do so even today, lies here.'⁹

Hence, reservations.

Hence, reservations continued indefinitely.

In any case, merit and efficiency won't be affected

Can it be that equality must not be ensured by giving the disadvantaged 'concessions, relaxations, facilities, removing handicaps and making

suitable reservations,’ asks Justice Fazal Ali in *N.M. Thomas*, ‘*merely because* they cannot come up to the fixed standards’? That is the first step: belittle the standards that are being used. But always make sure, you don’t propose any alternative ways of measuring suitability or ability, lest critics get a chance to compare the standards you have proposed with the existing ones, and ask how your set is better.

In several parts of the country, people lack communications, they do not have transport and health facilities, Justice Fazal Ali reminds us. ‘Could we say that the citizens hailing from these areas should continue to remain backward’ – pause a minute: who has said that the people of these regions ‘should continue to remain backward’? How does asking the question whether reservations of jobs for them is the optimal remedy, from their point of view and from the point of view of ensuring that the state is able to discharge its functions in the best possible manner, how is asking this question tantamount to maintaining that the people of these regions ‘should continue to remain backward’? – ‘*merely because* they fall short of certain *artificial* standards fixed by various institutions? The answer must be in the negative....’¹⁰

The standards are ‘artificial’. Failing them is ‘merely’ to not come up to artificial constructs.

Positively perverse

But belittling is just the first step. In the reckoning of these judgments, not only are notions of merit and efficiency little more than devices of the upper castes to perpetuate their hegemony, the tests that are used to assess them are so flawed as to make them not just worthless but positively perverse!

To subject the candidates and employees from the backward castes to the standards demanded of others is ‘not only illogical, inconceivable, unreasonable and unjustified but also utterly overlooks the stark grim reality of the SEBCs suffering from social stigma and ostracism in the present day scenario of hierarchical caste system,’ declares Justice Ratnavel Pandian in *Indra Sawhney*. If candidates from the backward castes are required to go through the same ‘rigid test mechanism being the highly intelligence test [sic] and professional ability test as conditions of employment, certainly these conditions will operate as “built-in headwinds”

for the SEBCs.’ He brushes aside the apprehension that the kinds of preferential treatment – in relaxed standards, in accelerated promotions, etc. – recommended by the Mandal Commission will vitiate the entire atmosphere of governance, that it would cause demoralization all round: ‘Conversely can it not be said that the non-implementation of the recommendations would result in demoralization and discontent among the SEBCs?’ he demands.¹¹

And the judge lays down a test for how long measures like reservations must continue. They must continue even when ‘the shackles whether of iron chains or silken cords are removed and the shackled person has become unfettered.’ ‘He must be given a compensatory edge *until he realises* that there is no more shackle on his legs because even after the removal of shackles he does not have sufficient courage to compete with the runner who has been all along unfettered.’¹²

Justice Sawant, as we saw, declares that Article 16(4) is not a poverty alleviation measure. Is it by chance an institution for psychological rehabilitation? Are government offices meant for the rehabilitation? Is this rehabilitation the mandate of the Constitution? Or is the mandate that reservations, etc., are to be provided without compromising efficiency of administration?

Next, Justice Pandian pushes the usual obfuscatory argument. ‘A programme of reservation may sacrifice merit but does not in any way sacrifice competence,’ he declares. How come? ‘Because,’ the judge says, ‘the beneficiaries under Article 16(4) have to possess the requisite basic qualification and eligibility’ – a subtle misstatement in view of the fact that the ‘basic qualification’ is demonstrably lowered in their case; ‘and have to compete among themselves though not with mainstream candidates’ – another sleight of words in view of the imperative need to attract and induct the very best into the governmental structure.¹³

Not just the tests, the assessers are perverse

We have already encountered Justice Chinnappa Reddy’s observation, ‘The mere scoring of high marks at an examination may not necessarily mark out a good administrator.’ That sort of setting-aside-the-test-by-merely-raising-

a-question is a much favoured technique, and we encounter it in many judgments. Thus, to take one instance, in *Saurabh Chaudri v. Union of India*, we are told:

The essence of equality is enshrined in Article 14 of the Constitution of India. But does it mean that equality clause must be applied to all citizens, to all situations? It is true that the country should strive to achieve a goal of excellence, which in turn would mean that meritorious students should not be denied pursuit of higher studies. This itself brings us the question, *who is to judge the merit and what are the standards therefor? It is extremely difficult to lay down a foolproof criteria. Success or failure of a candidate in one examination or the other may not lead to infallible conclusion as regard the merit of a candidate so as to achieve excellence.* The larger question, therefore, would be how to and to what extent balance should be struck....¹⁴

Notice that just a doubt is raised in such passages about the extent to which the criteria that have been adopted are actually reliable. But in subsequent judgments, the *doubt* is invoked as a *conclusion*, as a conclusion that has been arrived at by the court *on the basis of empirical evidence!*

In the judgment in which he cites the dictum of Justice Chinnappa Reddy at length, Justice K. Ramaswamy builds a few more storeys on it – it isn't just that assessments 'may not necessarily' indicate true merit, the assessments in vogue sprout from prejudice and other collateral considerations, he says. "The question then is: what is the meaning of the phrase 'efficiency in administration'? In *D.T.C. case*, it was observed in para 275 that 'the term efficiency is an elusive and relative one to the adept capable to be applied in diverse circumstances. *If a superior officer develops liking towards a sycophant, though corrupt, he would tolerate him and find him to be efficient and pay encomiums and corruption in such cases stands as no impediment [sic]. When he finds a sincere, devoted and honest officer to be inconvenient, it is easy to cast him/her off by writing confidential reports with delightfully vague language imputing him to be 'not up to the mark,' 'wanting public relations,' etc. At times they may be termed to be 'security risk'. Thus they spoil the career of the honest, sincere, devoted officers. Instances either way are galore in this regard...*'¹⁵

Words sweeping enough to throw into doubt every assessment! For, this being the assessment of the Supreme Court, it will be up to the person writing that confidential report to prove that he has not been swayed by sycophancy, that he is not condoning corruption, that he has not been

prejudiced by the fact that the sincere, devoted, honest officer is an impediment to the wrong that he, the supervising officer, wants to do!

Indeed, the judges seem to have no doubt about the perversity of those whose responsibility it is to recruit, to assess, to fill vacancies. 'It is common knowledge,' says the Supreme Court, 'that selections are not objectively being made to select the candidates belonging to the *Dalits* and tribes to fill up the vacancies reserved for them though qualified candidates are available to be promoted/appointed, with a view to see that reserved vacancies are got filled up and the same are passed off as eligible candidates being not available so as to ensure that carry-forward vacancies either exceed 50% of the accumulated total vacancies or that selection goes beyond three years so as to make the Government de-reserve the vacancies...' ¹⁶

Hence,

- The system has no merit;
- Notions of merit and efficiency are 'a pure Aryan invention', a mere device to perpetuate the hegemony of upper castes;
- Measures and procedures by which merit and efficiency are adjudged are at best irrelevant, ever so often they are little short of perverse;
- The ones charged with assessing officers are prejudiced; they are out to do in the honest subordinate who happens to be inconvenient precisely because he is honest and is not prepared to make himself available for the wrong that the assessing officer wants to accomplish.

This being the case, why should one be efficient? Indeed, to be efficient in such circumstances would only mean that one is being an efficient instrument of a system that should actually be overthrown. Why slave for a system which, the Supreme Court judges themselves tell us, is rigged to exploit us and our kin?

This, or else

A lecture on induction!

Both in regard to initial recruitment as well as in regard to promotions, a series of relaxations has been granted for the reservationists -one and all by maintaining the fiction that these will *not* affect the efficiency of administration! A Parliamentary Committee lists the relaxations.

The upper age limit is to be relaxed by five years in their case. Where requirements of experience have been specified ('Should have held post "X" for "Y" years before he can be considered for post "Z".'), these will be relaxed.

Where standards of suitability for a post have been prescribed for direct recruitment, these will be relaxed.

Where promotion is by what is known as the 'non-selection method', if a sufficient number of candidates is not available, eligible SC/ST candidates may be picked up 'till the bottom of the seniority list for filling up the reserved vacancies'.

Where promotion is by the 'selection method', 'the normal zone of consideration is extended up to five times the number of vacancies proposed to be filled up by promotion in order to make up the shortfall of suitable SCs/STs in the normal zone of consideration.'

Separate interviews are held for the SCs/STs in direct recruitment – so that, in effect, assessment of them is not impacted by the qualifications or attainments of non-reservationists.

Wherever Limited Departmental Competitive Examinations are held for promotion, the qualifying marks shall be relaxed in the case of reservationists.

Wherever qualifying examinations are prescribed for promotion, these are relaxed for the reservationists. 'SC/ST candidates not up to the general

qualifying standard could be considered for promotion provided they are not found unfit,' the prescription runs.

Where standards of evaluation have been prescribed for promotion, the reservationists 'not meeting the prescribed benchmark could be promoted provided they were not found unfit for promotion'.¹

That, of course, is just a standard list. As and when the political class in a state has felt compelled to appease the strong and well-organized reservationist caste – organized as well inside services as outside -they have enlarged such relaxations further. The qualifying score for promotion had already been put at 40 per cent for SC/ST officers as against 60 per cent for general category officers. As even greater latitude was demanded, in the case of selection posts, a new scheme was introduced: 'the best among the failures scheme'. Under this scheme, even if a reservationist scored no more than 20 per cent, he would be promoted to the higher selection post – nominally, a condition was attached to his promotion: he would be given practical training in the post for six months; and the promotion will be regularized when he is found to have imbibed the lessons of the training. This further facility is made available, even though the reservationists are given special coaching before they appear for the selection.

But reflect just on that standard list itself. The rule now says that the reservationists must be promoted 'provided they are not found unfit'. In a word, unless someone records a definite finding that the person in question is 'found unfit' for promotion, he *will* be promoted. But who dare record such a finding in today's atmosphere? *He* will be held to account, not the person he has found unfit: *he* will have to prove that *he* is not actuated by anti-SC/ST/OBC prejudice.

Such concession – their number, their extent, the very terms used: '*relaxation* of experience', '*relaxation* of standards', '*relaxation* in qualifying marks,' '*relaxation* in qualifying examination,' '*relaxation* in standards of evaluation' – can leave no doubt that, put in force, the relaxations cannot but lower the efficiency of administration.

Given the mandate of Article 335, given the judgments in which it has declared that concessions given under Article 16(4) must conform to the requirement prescribed in Article 335, given the judgments in which it has held time and again that efficiency of administration is of paramount

importance – given all this, the Supreme Court has pronounced that such relaxations are not permissible.

The nine-judge bench did so in *Indra Sawhney v. Union of India* in 1992.

A two-judge bench reiterated it in *S. Vinod Kumar v. Union of India* in 1996. The bench also made clear that the protection of five years that had been given to reservations in promotions did *not* apply to these relaxations.

Three years later, in 1999, a five-judge bench again emphasized in *Ajit Singh v. State of Punjab* that such relaxations were not permissible in law. On the contrary, it said, ‘the provisions of the Constitution must be interpreted in such a manner that a sense of competition is cultivated among all service personnel, including the reserved categories.’

A legal opinion

With each judgment, the clamour of the political class became shriller. Government promised to take back the instructions it had issued to implement the judgments. It sought the opinion of its highest law officer. The opinion drew attention to the judgments. It pointed out that the Government was bound by them. Only to add that, if the contrary had to be done, that could be done by amending the Constitution, though that Amendment would, of course, be open to challenge in courts. Next, it proceeded to make a suggestion to clear the passage, so to say, through the courts. It advised:

An amendment of the Constitution may be considered by way of a proviso to Article 335 rather than as a sub-Article or proviso to Article 16. This could conceivably enable the Government to contend that the Right to Equality, which is a basic structure of the Constitution, is not, in any manner, being affected by the amendment, and that the Article requiring maintenance of efficiency of the administration is being suitably amended and thus no part of the basic structure of the Constitution is damaged or destroyed.²

Lawyers and judges alone, I suppose, will understand how, something that endangers the Basic Structure of the Constitution when it is put in Article 16, does not do so when it is put in Article 335!

The opinion contained a suggested text of the proviso. The politicians made the text even more comprehensive. And the Constitution was amended for the eighty-second time.

Article 335 is now diluted by the following proviso:

Provided that nothing in this Article shall prevent in making of any provision in favour of the members of the Scheduled Castes and Scheduled Tribes for *relaxation in qualifying marks in any examination or lowering the standards of evaluation*, for reservation in matters of promotion to any class or classes of services or posts in connection with the affairs of the Union or of a State.

In a word, qualifying marks shall be lowered, standards of evaluation too shall be lowered in regard to promotions ‘to any class or classes of services or posts’. But the fiction stays: efficiency of administration is of paramount importance. And prime ministers keep announcing plans for administrative reform!

Another dyke blown

There was one straw left: in *R.K. Sabharwal v. State of Punjab*, a case which, like all others of this genre, was keenly contested, the Constitution bench of the Supreme Court held that, while SCs/STs would receive accelerated promotions through the roster system, they would not get a leap over their colleagues in seniority also. In other words, if, by virtue of the roster, X leaped over Y who was his senior by, say three years, when Y got his promotion in the normal course, he would regain his seniority of three years. The point became decisive in many a case in which, X, having leaped over Y because of the roster, would claim that, as he had been longer in the higher post, he had a right to be promoted to the *next* post before Y even though Y had by now come to the same level. Through this process, X asserted a pre-emptive right even to general category post – posts that were not reserved for SCs/STs. The Supreme Court held that in general category posts, merit and seniority would be the criteria, that according preferential treatment even in these posts to the reservationists would amount to reverse discrimination.

Time and again, the Supreme Court struck ‘consequential seniority’ down as violative of the Constitution. Those who have leapfrogged because of reservations in promotions, because of the roster system, etc., will not acquire seniority over their colleagues from the general category, the court held: because of these devices, ‘X’ may leap over the general category officer ‘Y’ who is senior to him, and get to the next grade; but when and if,

in the normal course, ‘Y’ also gets promoted to that higher level, he shall be given his seniority in reckoning the two for the still higher post.

For reasons such as these, in a series of cases, such as *Virpal Singh Chauhan*, the court held that ‘seniority between the reserved category candidates and general candidates in the promoted category shall continue to be governed by their panel position, i.e. with reference to their *inter se* seniority in the lower grade. The rule of reservation gives accelerated promotion, but it does not give the accelerated “consequential seniority”...’ Therefore, if an SC/ST employee has secured accelerated promotion because of the roster,

Whenever a question arises for filling up a post reserved for Scheduled Caste/Tribe candidate in a still higher grade then such candidate belonging to Scheduled Caste/Tribe shall be promoted first but when the consideration is in respect of promotion against the general category post in a still higher grade then the general category candidate who has been promoted later shall be considered senior and his case shall be considered first for promotion applying either principle of seniority-cum-merit or merit-cum-seniority.

Apart from the fact that any other construction would violate Article 14 and 16(1), the court drew attention to the consequence that would follow if this rule were to be disregarded. It said:

If this rule and procedure is not applied the result will be that majority of the posts in the higher grade shall be held at one stage by persons who have not only entered service on the basis of reservation and roster but have excluded the general category candidates from being promoted to the posts reserved for general category candidates merely on the ground of their initial accelerated promotions. This will not be consistent with the requirement or the spirit of Article 16(4) or Article 335 of the Constitution.³

The Constitution bench of the court specified the law beyond doubt again in *Ajit Singh(II) v. State of Punjab*.⁴ It reiterated the decision in *Ram Prasad v. D.K. Vijay*.⁵ And again in *Jatinder Pal Singh v. State of Punjab*.⁶ And yet again in *Sube Singh Bahmani v. State of Haryana*.⁷

Several state governments continued to disregard the decisions of the Supreme Court with impunity. Accordingly, the matter came up yet again before the Supreme Court in 2000. Once again, the Supreme Court ruled unambiguously: granting seniority along with accelerated promotions is a

complete violation of the Constitution – indeed, to such an extent does it breach the fundamental right to equality of the general category employees that it violates the Basic Structure of the Constitution. In *M.G. Badappananavar v. State of Karnataka*,⁸ the Supreme Court recalled the series of judgments in which it had struck down rules and schemes that conferred seniority to reservationists in this manner, and held, ‘The roster promotions were... meant only for the limited purpose of due representation of backward classes at various levels of service. If the rules are to be interpreted in a manner conferring seniority to the roster-point promotees, who have not gone through the normal channel where basic seniority or selection process is involved, then the rules... will be *ultra vires* Article 14 and Article 16 of the Constitution of India. Article 16(4A) cannot also help. *Such seniority, if given, would amount to treating unequals equally, rather, more than equals*’⁹

The court went over the reasons for its decisions once again, and emphatically stated:

Equality is a basic feature of the Constitution of India and any treatment of equals unequally or of unequals as equals will be violation of the *basic structure* of the Constitution of India. [Italics in the original.] That is one more reason why, according to us, the roster-point promotees cannot be given seniority. Therefore, if seniority is given, it will violate the equality principle which is part of the basic structure of the Constitution.

Even Article 16(4-A) cannot, therefore, be of any help to the reserved candidates. That is the legal position under the Constitution of India.¹⁰

Accordingly, the court ruled that grave injustice had been done to those general level officers who had been robbed of promotions and had retired in the meantime. But for the operation of this unconstitutional scheme, they would have secured ‘substantial benefits which were unjustly denied to them’.¹¹

The underlying reasoning had been explained by the Supreme Court at length in *Indra Sawhney* itself. In that case, the court had stressed that, while the rationale for reservations was that unequals should not be treated equally, and the backward castes were deemed to be disadvantaged vis-à-vis the forward ones because of the centuries of oppression to which they had been subjected,

But once the advantaged and disadvantaged, the so-called forward and backward, enter into the same stream then the past injustice stands removed. And the length of service, the seniority in cadre of one group, to be specific the forward group, is not as a result of any historical injustice or undue advantage earned by his forefather or discrimination against the backward class, but because of the years of service that are put in by an employee, in his individual capacity. This entitlement cannot be curtailed by bringing in again the concept of victimization. Equality either as propagated by theorists or as applied by courts seeks to remove inequality by ‘parity of treatment under parity of condition.’ But once in ‘order to treat some persons equally, we must treat them differently’ has been done and advantaged and disadvantaged are made equal and are brought in one class or group then any further benefit extended for promotion on the inequality existing prior to be brought in the group would be treating equals unequally. It would not be eradicating the effects of past discrimination but perpetuating it.¹²

In a word, the Supreme Court had reiterated the law in this regard – unambiguously and repeatedly.

The judiciary had tried to save this, the last dyke. The executive moved that the Constitution be amended to overturn these judgments, and the legislature, with much acclamation, passed the eighty-fifth amendment. The seventy-seventh amendment passed not long ago, had, as we have seen, introduced a new provision – Article 16(4A). This was now modified, and, henceforth, was to read:

Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, *with consequential seniority*, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

As a result, the person securing accelerated promotions because of the roster system will in addition secure a pre-emptive claim to the still higher post – even when the latter is a general category post.

Faith to the rescue

Apart from the effect that the induction of those who are not up to the mark may have on the character and norms of a service; apart from the values and attitudes which such preference will stoke among those to whom it is made available, the consequence is that, here and now, the quality of the service, the quality of students in educational institutions is naturally lower than it would otherwise have been. This is a simple, one may say tautological

consequence. The progressive judges often acknowledge this, but they put their faith in hope, saying that they are sure that *eventually* the candidates who are taken in through reservations will overcome their initial handicaps.

Just as often, they take recourse to denial – plain and simple. They declare that the fact that candidates are being inducted who at the relevant time do not have the qualifications which have been prescribed will affect quality is just an unsubstantiated conjecture. In a typical peroration, a bench of the Supreme Court, invoking homilies from an earlier ruling of two judges, breaks into a lecture. It reminds us, ‘to prove a fact, inference must be drawn on the basis of evidence and circumstances. They must be carefully distinguished from conjectures or speculation. The mind is prone to take pleasure to adapt circumstances to one another and even in straining them a little to force them to form parts of one connected whole.’ Is this not an exact description of what the court is doing in the sentences that follow its homily? The court continues, ‘There must be evidence direct or circumstantial to deduce necessary inferences in proof of the fact in issue. There can be no inferences unless there are objective facts, direct or circumstantial, from which the other fact which is sought to be established can be inferred. In some cases, the other facts can be inferred, as much as is practical, as if they had been actually observed. In other cases, the inferences do not go beyond reasonable probability. If there are no positive proved facts, oral, documentary or circumstantial, from which the inferences can be made, the method of inference fails and what is left is mere speculation or conjecture. Therefore, for an inference of proof that a fact in dispute has been held established, there must be some material facts or circumstances on record from which such an inference could be drawn. In the absence of any issue and facts and proof thereof, the inference that reservation in promotion deteriorates the efficiency of administration remains only a conjecture or an opinion based on no evidence....’

By this peroration, and without an iota of ‘facts and proof, that the lecture calls for, reservations are justified not just at the time of induction into a service, say, but also in promotions.¹³

Contrast this peroration on deduction/induction with the counsel that the court rightly gives in another case. It transpired that persons from a few of the better-off sections among the intended beneficiaries were filling up all

the seats that had been reserved. Accordingly, the Government in Andhra issued a notification partitioning the deprived castes into four segments, and assigned specified proportions of the reserved seats to members of each category. Striking down the notification, the Supreme Court notes, *inter alia*, that the groups in question – Relli and Adi-Andhra – are hardly educated. ‘Only 2% of the members of the said community have studied in secondary school,’ it notes. ‘No one has ever been admitted in any engineering discipline or other professional disciplines.’ This has a direct bearing on the extent to which decreeing reservations will help the communities, even if we disregard what doing so will spell for efficiency of administration: ‘The said facts clearly go to show that providing reservation for them in engineering or medical discipline or in public service would not solve their problem. Without such basic education, the members belonging to the said community would not be getting admission either in the engineering or medical colleges or other professional courses and as such the question of their joining public service may not arise at all. Now, even for the post of Class IV employees, qualification of passing matriculation examination is provided.’ Accordingly, the Supreme Court holds, ‘*What was necessary in the situation was to provide to them scholarships, hostel facilities, special coaching, etc., so that they may be brought on the same platform with the members of other Scheduled Tribes, viz., Madiga and Mala, if not with the other backward classes.*’ ‘Unless children of the said community are educated, the provision for both for education as also public service would be a myth for them and ultimately in view of the impugned legislation for all intent and purport,’ the court notes, and its observation applies to many a community that has been sought to be beguiled by reservations, ‘the benefit thereof would go to other categories. The State, in our opinion, should take positive steps in this behalf.’¹⁴

The court correctly does *not* put its faith in hope – that ‘these sections will overcome their initial handicaps eventually.’ The court rightly eschews populism and bases its declaration on the sound premise that the groups and individuals must first be prepared for the jobs they are to be assigned before granting them the right to claim those jobs as a matter of right. Transpose the premise, transpose the very words to instances in which the persons who are getting into medical and engineering courses are little equipped for

them, and see how well they fit. But in this case, the Supreme Court maintains that first the candidates must be equipped. In others that, once inducted, they will eventually overcome their initial handicaps. Induction in one set of cases, deduction in others!

Relaxation to the point of waiver

If the state may relax standards while assessing its own employees, why should it not be possible to relax standards in educational institutions? If standards can be relaxed, why can the relaxation not be to any extent, even to the extent of waiving them altogether? Sure enough, that is exactly what has happened.

Even in the early 1960s, the court had been in no doubt about the imperative need to ensure that standards do not suffer. The Supreme Court had been emphatic about this in *M.R. Balaji*. The awakening in all sections of society has led to an ever-increasing demand for higher education, it had noted. But then cautioned, ‘While it is necessary that the demand for higher education which is thus increasing from year to year must be met and properly channelised, we cannot overlook the fact that in meeting that demand standards of higher education must not be lowered.’ ‘The large demand for education may be met by starting larger number of educational institutions, vocational schools and polytechnics,’ the court observed. ‘But, it would be against the national interest to exclude from the portals of our universities qualified and competent students on the ground that all the seats in the universities are reserved for weaker elements in society. As has been observed by the University Education Commission,¹⁵ *‘he indeed must be blind who does not see that mighty as are the political changes, far deeper are the fundamental questions which will be decided by what happens in the universities.’* Therefore, in considering the question about the propriety of the reservation made by the impugned order, we cannot lose sight of the fact that the reservation is made in respect of higher university education.’ If only, someone would read out such warnings to the cynical opportunists who are ramming reservations down the throats of the few remaining islands of excellence – the IITs and IIMs. ‘The demand for technicians, scientists, doctors, economists, engineers and experts for the further economic advancement of the country is so great that it would cause grave

prejudice to national interests if considerations of merit are completely excluded by whole-sale reservation of seats in all technical, Medical or Engineering colleges or institutions of that kind. Therefore, *considerations of national interest and the interests of the community or society as a whole cannot be ignored in determining the question as to whether the special provision contemplated by Article 15(4) can be special provision which excludes the rest of the society altogether.* In this connection, it would be relevant to mention that the University Education Commission which considered the problem of the assistance to backward communities, has observed that *the percentage of reservation shall not exceed a third of the total number of seats*, and it has added that the principle of reservation may be adopted for a period of ten years....¹⁶

The Supreme Court recalled what it had held even in *Rangachari*, a judgment much favoured by reservationists. Even while recognizing that the upliftment of the disadvantaged is of 'paramount importance', the Court had stressed, *'It must not be forgotten that the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency of administration.* That undoubtedly is the effect of Article 335. Reservation of appointments or posts may theoretically and conceivably mean some impairment of efficiency; but the risk involved in sacrificing efficiency of administration must always be borne in mind when any State sets about making a provision for reservation of appointments or posts.' 'It is also true that the reservation which can be made under Article 16(4) is intended merely to give adequate representation to backward communities,' the court pointed out. *'It cannot be used for creating monopolies or for unduly or illegitimately disturbing the legitimate interests of other employees.* In exercising the powers under Article 16(4) the problem of adequate representation of the backward class of citizens must be fairly and objectively considered and an attempt must always be made to strike a reasonable balance between the claims of backward classes and the claims of other employees as well as the important consideration of the efficiency of administration...'¹⁷

The scales are tilted

As populism took hold of the political class, as what passes for progressivism came to grip public discourse, the court too got taken in. At first, the formulations were still in terms of ‘striking a balance’, but soon the balance began to be weighted in a particular direction. Thus in *A. Periakaruppan*, the Supreme Court maintained that a balance had to be struck between the immediate interests that accrue to the nation from inducting those who are best qualified and the long-term interests that accrue from lifting the disadvantaged -again, that zero-sum notion of change and growth: may it not be that the best way to lift the downtrodden, the best way to ensure that they get the best possible services like public health facilities is to induct only those who are at the time the work has to be done the best equipped to do it? Furthermore, the Supreme Court said, ‘Advantages secured due to historical reasons should not be considered as fundamental rights.’ The fundamental right in question was equality. The proposition that the court now adopted was that a category of candidate – those who had not been born to parents from the lower caste – were not claiming the fundamental right to equality guaranteed to them by the Constitution; they were demanding that ‘the advantages they had secured due to historical reasons’ should be considered as fundamental rights!

By the time we come to *State of Madhya Pradesh v. Nivedita Jain*, the scale has been turned upside down. In this case too the Supreme Court was dealing with institutions of higher education. Indeed, the question before it pertained to one of the very disciplines on which it had pronounced in *M.R. Balaji*, namely medical colleges. But this time round, the same Supreme Court held that *Government can relax qualifying criteria to whatever extent it deems necessary for filling the seats set aside by reservations, even to the extent of doing away altogether with the requirement* – in that case the requirement was that the candidate must have obtained at least a prescribed level of minimum marks. And the court insisted that doing so does *not* amount to relaxing the standards of education. For, the court maintained, the candidate will have to fulfil the same standards as everyone else *after* she or he is admitted and advances in their studies. And so, we can be confident that this doing away with even so fundamental a condition will do no harm to the standard of doctors who will emerge from the courses!¹⁸

Induction in practice!

Judges like Justice H.R. Khanna and Justice A.R. Sen, of course, drew attention to the plain meaning of what had been provided in the Constitution, but aggressive populism is what prevailed. In *N.M. Thomas*, Justice Khanna reminded all concerned of the scheme that had been adopted in the Constitution – a scheme to help the Scheduled Castes and Tribes but in ways and to the extent that doing so did not impair the all-important efficiency of governance. In view of the mandate imposed by Article 335, ‘it is not permissible to waive the requirement of minimum educational qualification and other standards essential for the maintenance of efficiency of service.’¹

Four years after the Supreme Court had put its seal on the complete jettisoning of the required qualifications, Justice A.P. Sen warned of the consequences of such misplaced fervour. The words he used, the institutions to which he referred were ones that were to come up again before the court, and the court’s pronouncements in regard to these in later judgments demonstrate how much the court has been swayed by populist discourse over the years. Justice Sen pointed to the injury that would be done all round if standards were diluted, and how the scheme of the Constitution had carefully safeguarded the country against such a ditch. ‘I wish to add that the doctrine of protective discrimination embodied in Article 15(4) and 16(4) and the mandate of Article 29(2) cannot be stretched beyond a particular limit,’ he said, standing up to the populism that had taken hold of the court. “The State exists to serve its people. There are some services where expertise and skill are of the essence. For example, a hospital run by the State serves the ailing members of the public who need

medical aid. Medical services directly affect and deal with the health and life of the populace. Professional expertise, born of knowledge and experience, of a high degree of technical knowledge and operational skill is required of pilots and aviation engineers. The lives of citizens depend on such persons. There are other similar fields of governmental activity where professional, technological, scientific or other special skill is called for. In such services or posts under the Union or States, we think there can be no room for reservation of posts; merit alone must be the sole and decisive consideration for appointments.’²

Notice that such pronouncements were already becoming rarer with each passing year. Notice too that the court had already come down many notches – from upholding the necessity for standards at all times in all institutions at all levels, to upholding them at least at the higher levels of all institutions, to upholding them, as in Justice Sen’s text, in some disciplines in some institutions. This was made specific soon – there shall be no reservations in ‘specialities and super-specialities’, the court declared in *Indra Sawhney*, using some of the same examples as Justice Sen had enumerated – engineering aviation, medical services... The fate which even that dyke has since met, we shall soon encounter.

From this it was but a step for the court to turn Nelson’s eye, so to say, towards bare facts also. With even passing acquaintance with judgments of our courts, including those of the Supreme Court, each of us can readily recall scores of judgments in which the verdict was made to turn on the narrowest difference of words, of dates of communications and circulars. But when activist judges are in mind of advancing social justice, so to say, they make light of even the most glaring facts.

A typical instance occurred in *Ajay Kumar Singh*. The court records that at one stage the counsel for the petitioners pointed out that if the principle that the Supreme Court had adumbrated in the case that was under discussion³ were to be applied uniformly, it would adversely affect the legislative ambit that had been set apart for Parliament. Furthermore, building on what had been laid down in that case, a state government had now given the go-ahead to provide that ‘a student belonging to a reserved category obtaining one mark in entrance test would yet be eligible for admission in postgraduate courses in a situation where the eligibility

percentage is, say, 50% for open competition candidates.’ The counsel pointed out that this sort of a situation ‘is bound to affect the standards of education.’

The Supreme Court dismissed the argument, observing, ‘In our opinion, Sri [Harish] Salve is over-drawing the picture. A perusal of the judgment in *Nivedita Jain* shows that the minimum eligibility marks prescribed for general candidates for admission to M.B.B.S. was [sic] 50 whereas for Scheduled Castes/Scheduled Tribes candidates it was 40 marks....’ But what the court itself says in the very next sentence shows how right the counsel was in his apprehension, and how blithely the court had glided over facts. The court continues, ‘During a particular year, it so happened that even after relaxing the minimum eligibility marks by 5 per cent, Scheduled Castes/Scheduled Tribes candidates were not available in adequate number to fill the seats reserved for them. It was in such a situation that the government resorted to the exceptional step *of removing the minimum required marks altogether for that year* in exercise of power of relaxation.’ This was not a permanent feature, the court says, it was just something done for that year.

Just five paragraphs later, we come across another instance. The court says that in that case too the minimum qualifying marks were 50 per cent for general competition candidates and 40 per cent for reserved category candidates. ‘Only when the students in requisite number were not available was [sic] the said criteria reduced to 40 per cent and 30 per cent respectively’ ‘This *small distinction* in the eligibility criteria can, by no stretch of imagination, be said to impinge upon the determination or coordination of standards in institutions of higher learning.’ We are in an environment in which cut-off marks for admission to different colleges in, say, the Delhi University are specified to the decimal point; an environment in which writs have been entertained and decided on differences in dates of recruitment, in marks in the second order of smalls. And yet a reduction from 50 per cent to 40 per cent, and then to 30 per cent is just ‘this small distinction’!⁴

True, the Supreme Court concedes in *Ajay Kumar Singh* that some of the earlier judgments of the Supreme Court itself were ‘premised on the assumption that reservations are basically anti-meritarian’; that in some of

these judgments the court had assumed that ‘reservation necessarily implies selection of less meritorious persons,’⁵ and declares, ‘We are afraid, this assumption is without any basis.’ And that is enough!

First, to the extent that merit and efficiency have to be sacrificed, the Supreme Court maintains, this is a price that just has to be paid for making good the promise that has been made in the Constitution – the promise of social justice for all, especially for members of the lower castes. In a passage that is often cited in subsequent judgments, such as *Indra Sawhney*, the Supreme Court puts the point as follows:

....The relevance and significance of merit at the stage of initial recruitment cannot be ignored. It cannot also be ignored that the very idea of reservation implies selection of a less meritorious person. At the same time, we recognize that this much cost has to be paid, if the constitutional promise of social justice is to be redeemed.

That opening would have been enough to cause a little tremor in progressive hearts! In it, the significance of merit is conceded. And there is the unpardonable acknowledgement: that ‘the very idea of reservation implies selection of a less meritorious person.’ The very next sentence, however, retrieves the ground that is conceded in those lines:

We also firmly believe that given an opportunity, members of these classes are bound to overcome *their initial disadvantages* and would compete with – and may, in some cases, excel – members of open competition. It is undeniable that nature has endowed merit upon members of backward classes as much as it has endowed it upon members of other classes and that what is required is an opportunity to prove it. It may *not*, therefore, be said that reservations are anti-meritarian. Merit there is even among the reserved candidates and the *small difference* that may be allowed at the stage of initial recruitment is bound to disappear *in course of time*. These members too will compete with and improve their efficiency along with others.

The retrieval is strained, however! That members who have to enter services today through reservations will eventually overcome their current disadvantages may be true – though the one way to induce them to do so is by *not* fomenting the culture, ‘This job is my right, it is my entitlement,’ but by instituting a culture in which each person has to strive to attain a job and to keep it. But even if we assume that eventually everyone will make up the deficiencies that hobble him today, the court shuts its eyes to the fact that *the job has to be done today*. If that job is done inadequately today, the

prospects for *everyone* – including those for members of Scheduled Castes, etc. – will be fewer.

But the Supreme Court does not allow that sort of a consideration to come in the way – not in *Indra Sawhney*, nor in subsequent judgments. In *Ajay Kumar Singh*, the court reproduces that passage of hope and faith in eventual outcomes, and builds several storeys on it.

No concession is being given to members of Scheduled Castes, etc., in passing examinations, it says. All that is being done is that they are being enabled to enter the course or service. Once they have entered, they have to learn as much as those who entered the course from the general quota, they have to perform as well in the jobs they are assigned. ‘This circumstance is a complete answer,’ it declares, ‘to the argument of “less merit”. No empirical study has been brought to our notice to establish that candidates admitted under reserved quotas generally lag behind in the matter of marks or proficiency in the final examinations. *They may enter under different categories but they come out as one class.*’⁶

The court itself does not seem confident about that assertion for in the very next paragraph it has to deal with the fact that candidates who entered, say, an undergraduate medical course through reservations demand to be inducted into the postgraduate course also through reservations! They have already availed of reservations, the counsel for the petitioners in *Ajay Kumar Singh* argued. How can they be entitled to another slew of seats through the reserved quota? On the court’s own premise, though they entered the undergraduate course in a separate, preferential stream, as they have been made to learn as much as others during the course, as they have had to pass the same examination upon leaving the course, they leave the course as one class along with the general candidates. As this is the case, why should they need or have a right to reservations again at the bar of the postgraduate course? The court’s answer shows how little confidence it has in what it asserted in the passage we just encountered.

‘Firstly, the assumption on the basis of which this argument is addressed is itself untenable,’ says the court. ‘A candidate who is seeking reservation at the stage of admission to post-graduate course may not have availed of the benefit of reservation at the stage of admission to MBBS; he could as well have been admitted on his own merit in the general quota (open

competition quota); but because the competition at the level of post-graduate medical courses is extremely acute, he may have to seek the benefit of reservation.’ Two points leap up from this new formulation. First, the last clause in the sentence is itself an acknowledgement that, although the candidate has had the same facilities to study the undergraduate course as other candidates, he has not been able to get sufficient grip over the subjects and again needs special treatment – that itself flies in the face of what the Supreme Court had asserted in the previous paragraph. Second, assume as the court wants us to do, that this set of students had *not*, while others had got into the undergraduate course through reservation – why can we then not have a rule that *those who had availed of reservations in entering the undergraduate course shall not be entitled to reservations while entering the postgraduate course?*

Its empirical assertion out, the court takes recourse to the silence of law. ‘Secondly,’ the court proceeds, ‘there is no rule under Article 15(4) that a student cannot be given the benefit of reservation at more than one stage during the course of his educational career.’ But why not go by your own rulings that persons who have entered a stream become members of a single class, and to treat them differentially after that will be to treat equals unequally? And, hence, a violation of Article 14, which, in turn, is a basic feature of the Constitution.

The Court has a well-practised, frequently deployed evasion for an answer: ‘Where to draw the line is not a matter of law but a matter of policy for the State to be evolved keeping in view the larger interests of the society and various other relevant factors.’ That from a court that has drawn the line on so many matters!⁷

Attention was next drawn to what the court, following earlier judgments, had itself ruled in *Indra Sawhney*, namely that reservations are not defensible at higher levels in hierarchies, especially in certain areas. In a vital passage, the Supreme Court had said:

While on Article 335, we are of the opinion that *there are certain services and positions where either on account of the nature of duties attached to them or the level (in the hierarchy) at which they obtain, merit as explained hereinabove, alone counts. In such situations, it may not be advisable to provide for reservations. For example, technical posts in research and development organisations/departments/institutions, in specialities and super-specialities in medicine,*

engineering and other such courses in physical sciences and mathematics, in defence services and in the establishments connected therewith. Similarly, in the case of posts at the higher echelons, e.g., Professors (in Education), Pilots in Indian Airlines and Air India, Scientists and Technicians in nuclear and space application, provision for reservation would not be advisable.

...we are of the opinion that in certain services and in respect of certain posts, application of the rule of reservation may not be advisable for the reason indicated hereinbefore. *Some of them* are: (1) Defence Services including all technical posts therein but excluding civil posts. (2) All technical posts in establishments engaged in Research and Development including those connected with atomic energy and space and establishments engaged in production of defence equipment. (3) Teaching posts of Professor – and above, if any. (4) Posts in super-specialities in Medicine, engineering and other scientific and technical subjects. (5) Posts of pilots (and co-pilots) in Indian Airlines and Air India. *The list given above is merely illustrative and not exhaustive.* It is for the Government of India to consider and specify the service and posts to which the rule of reservation shall not apply but on that account the implementation of the impugned Office Memorandum dated 13th August, 1990 cannot be stayed or withheld.

Notice that, in this pronouncement in *Indra Sawhney*, the Supreme Court twice emphasized that the list it was giving of professions and posts in which reservations are not appropriate was merely illustrative: ‘*Some of these are....*,’ it said; ‘The list given above is *merely illustrative and not exhaustive*,’ it repeated.

That was manifestly the case: after all, if the posts of pilots and co-pilots are to be excluded on the ground that the slightest compromise in standards in regard to them can endanger the lives of hundreds, on what logic would one allow compromises in regard to the standards of ground personnel – among them, engineers -who maintain the aircraft? Or personnel in the Air Traffic Control Towers at airports who direct the pilots? Or the security personnel who check luggage?

Furthermore, can it be that what holds for control towers at airports holds less for those controlling the movement of trains?

Similarly, in medicine, what is a speciality or super-speciality and what is not? Neurology and cardiology are mentioned in Supreme Court judgments as specialities and super-specialities in which reservations should not be made. But is pediatric surgery any less of a speciality? Is orthopedic surgery less of a speciality? Or gastroenterology? Or the care of neonatal or spastic children? Or Oncology?

When they want to support a proposition, the judges are apt to take passages like the foregoing from *Indra Sawhney* and locate the general

reasoning or principle behind the words, and swiftly apply it to the matter at hand.

And when they don't? In *Ajay Kumar Singh*, confronted with its own declarations in *Indra Sawhney* and earlier cases, the Supreme Court takes recourse to fine distinction. 'While making the above observations,' the Supreme Court observes, 'the Court was speaking of posts in research and development organisations, in specialities and super-specialities in medicines, engineering and such other courses. The Court was not speaking of admission to specialities and super-specialities. Moreover, M.S. or M.D. are not super-specialities.' Notice the confounding: whether the discipline is a super-speciality relates to the *subject*; the court confounds that with the *degree* in the subject!

'In any event,' these judges now say, 'this Court did not say that they were not permissible; the Government was asked to consider the advisability of providing for reservations in those posts having regard to the nature and level of those posts.'⁸ This by a bench of three judges, who thereby reduce to a complete nullity what nine judges had said in *Indra Sawhney*. But there is one telltale commonality between the two benches – one activist judge!

There are cases aplenty in which the Supreme Court has addressed the question of admissions to courses in specialities and super-specialities. Among these, for instance, are the observations that the court had recorded in *Dr Jagadish Saran v. Union of India*.⁹ In these, the Supreme Court observed *inter alia*:

...But it must be remembered that exceptions cannot overrule the rule itself by running riot or by making reservations as a matter of course, in every university and every course. For instance, you cannot wholly exclude meritorious candidates as that will promote substandard candidates and bring about a fall in medical competence, injurious, in the long run, to the very region.

Pause a moment, and notice how much ground the court has already conceded. What, in its reckoning is impermissible? That 'you cannot *wholly* exclude meritorious candidates...'

But, to proceed:

It is no blessing to inflict quacks and medical midgets on people by wholesale sacrifice of talent at the threshold. Nor can the very best be rejected from admission because that will be a national loss and the interests of no region can be higher than those of the nation. So, within these limitations, without going into excesses, there is room for play of the State's policy choices... Flowing from the same stream of equalism is another limitation. The basic medical needs of a region or the preferential push justified for a handicapped group cannot prevail in the same measure at the highest scales of speciality where the best skill or talent, must be hand-picked by selecting according to capability. At the level of Ph.D., MD, or levels of higher proficiency, where international measure of talent is made, where losing one great scientist or technologist in-the-making is a national loss, the considerations we have expanded upon as important lose their potency. Here equality, measured by matching excellence, has more meaning and cannot be diluted much without grave risk. *The Indian Medical Council has rightly emphasised that playing with merit for pampering local feeling will boomerang. Midgetry, where summitry is the desideratum, is a dangerous art.* We may here extract the Indian Medical Council's recommendation, which may not be the last word in social wisdom but is worthy of consideration:

‘Students for postgraduate training should be selected strictly on merit judged on the basis of academic record in the undergraduate Course. All selection for postgraduate studies should be conducted by the universities.’

The case at hand concerned the decision of the Delhi University to reserve 70 per cent seats in postgraduate medical courses for those who had graduated from the Delhi University itself. But, surely, the point the Supreme Court was making about the need to ensure that only the best talent got into postgraduate medical courses, as well as the considerations underlying it, transcend the question of ‘institutional reservation’. Similarly, recall what it said about the interest of a region vis-à-vis that of the country as a whole: ‘Nor can the very best be rejected from admission because that will be a national loss and the interests of no region can be higher than those of the nation.’ When that holds for a region, why not for a caste? Is it any less justifiable to hold, ‘Nor can the very best be rejected from admission because that will be a national loss and the interests of no caste can be higher than those of the nation?’

And from the choice of word – ‘medical midgetry’, ‘midgetry, when summitry is the desideratum’ – you would by now have guessed not just that the observations had fallen from a progressive activist, but from *which* progressive activist!¹⁰

Notice too the approval with which in *Jagadish Saran* the Supreme Court cited the regulation formulated by the Indian Medical Council. But in *Ajay Kumar Singh*, it dismisses that very regulation on the ground that this

was just a recommendation, that it was in the nature of advice and is not a binding direction! True, the Indian Medical Council has made this recommendation; true that the Council is an autonomous organization; true its recommendation relates to a matter that falls squarely within the area for which the Council has been set up, but it was mere advice. And, in any case, though autonomous, the Council has to abide by general policies, laws, constitutional provisions.... This is the court's rationale in *Ajay Kumar Singh*.¹¹

In the next case, the court goes farther. True, the Medical Council has issued this regulation, it says, but the state governments have the right to regulate admission – after all, they are setting aside substantial amounts for medical and other education. True, Article 15(4) does not speak of or permit reservation in educational institutions; true, the Medical Council regulations prohibit reservations in postgraduate courses on any ground whatsoever, 'but it is too late in the day to question this power.'¹² In any case, even in *Jagadish Saran*, the court, having stated how excellence could not be allowed to be compromised in specialities and super-specialities, had hastened to add that these observations did not apply to reservations that were made for Scheduled Castes and Tribes and backward classes under the Constitution. These are a constitutional mandate, the court says.¹³

Recall the earlier assertion of the Supreme Court that reservations shall not entail any diminution of standards as they provide preferential treatment *only to enter* the course or service. After he enters, the reservation-candidate goes through the same courses, he handles the same jobs as general candidates, and he is judged by the same standards. This logic naturally leads the court to maintain that, unlike what the judges had prescribed in *Indra Sawhney* as well as in earlier judgments, reservations must be extended to specialities and super-specialities also. Thus in *Post-Graduate Institute of Medical Education and Research v. K.L. Narasimhan*, the court lays down:

The question is: whether by applying rule of reservation in admission into the specialities or super-specialities courses/faculties would lead to loss of proficiency or high excellence needed in the specialized or super-specialised faculties? In our considered view, it is not so. It is an accepted position that a student admitted to a medical course or a post-graduate course of study is required to pass the same standard of examination as is prescribed in the particular course of study.

Equally, a student, admitted on reservation, is required to pass the same standard prescribed for a speciality or a super-speciality in a subject or medical science or technology. In that behalf, no relaxation is given nor sought by the candidates belonging to reserved categories. What is sought is a facility or opportunity for admission to the courses, Ph.D., speciality or super-speciality or high technology by relaxation of a lesser percentage of marks for initial admission than the general candidates. For instance, if the general candidate is required to get 80% as qualifying marks for admission into speciality or super-speciality, the relaxation for admission to the reserved candidates is of 10 marks less, i.e. qualifying marks in his case would be 70%. A doctor or a technologist has to pass the post-graduation or the graduation with the same standard as had the general candidate and has also to possess the same degree of standard. However, with the facility of possessing even lesser marks the reserved candidate gets admission. Thereby, the proficiency is not affected.¹⁴

Having reached this far merely by elongation and brushing aside what it has itself held earlier, the Supreme Court elevates the enlargement of reservations to Justice – with a capital ‘J’! In *Post-Graduate Institute of Medical Education and Research*, the Supreme Court repeats the assertions we have encountered earlier – ‘the benefit of reservation does not *necessarily* imply down-grading the excellence’; the student who is inducted through reservations ‘is also *expected to have* the same degree of excellence’; ‘Securing marks is *not the sure proof* of higher proficiency, efficiency or excellence’ -and raises the stake, so to say. It declares:

As stated earlier, the benefit of reservation does not *necessarily* imply down-grading the excellence. Every student after admission into the postgraduate speciality or super-speciality is required to undergo the same course of study, same standard and higher performance for qualifying the courses for conferment of the degrees in the respective specialities or super-speciality or technical subjects. In that regard, there is no relaxation given to the candidates belong to reserved categories. A student who would pass post graduation on par with the general candidates is also *expected to have* the same degree of excellence on par with general candidate, with a lesser benefit of marks only for admission into the course of study by relaxing the same standard of marks. Securing marks is *not the sure proof* of higher proficiency, efficiency or excellence. These are matters of acquired ability by studious application of mind, skills in performance by the candidate concerned, be it general candidate or reserved candidate. It is a matter of application of the mind, constant assiduity to improve skills, capabilities and capacities and excellence in the subject or the field of action chosen by the candidate.

Up to this point, the court is reiterating what its activist members have asserted in earlier judgments. Now comes the addition:

In that behalf, it is common knowledge that marks would be secured in diverse modes. It is no indicia that particular percentage of the marks secured is an index of the proficiency, efficiency and excellence. *They are awarded in internal examination on the basis of caste, creed, colour, religion, etc.*

Pause for a moment, and read that again: marks are awarded, says the court, ‘on the basis of caste, creed, colour, religion, etc’ Is the court under no obligation to provide empirical evidence before it condemns the examination system wholesale in this manner? Marks are awarded in India ‘on the basis of caste, creed, colour, religion’? Do the increasing number of OBCs who are making it to competitive examinations, to medical and engineering colleges in the general category testify to that? Even the most fervent activist has not yet excavated evidence to establish that marks are given on the basis of a man’s creed, colour and religion! And yet, the court, having writ...

The very court that we encountered giving lectures on induction/deduction.

The very court that was reminding us, ‘to prove a fact, inference must be drawn on the basis of evidence and circumstances. They must be carefully distinguished from conjectures or speculation. The mind is prone to take pleasure to adapt circumstances to one another and even in straining them a little to force them to form parts of one connected whole.’

Facts missing, the court elevates the measure it sets out to approve to higher plane – that of principle!

It is the constitutional imperative of the executive to provide opportunities and facilities to the handicapped to acquire the degree in specialities, super-specialities or technical posts. *Denial thereof is a total denial of right to enjoy equality.* It is well-settled legal position that fundamental rights are to be interpreted broadly to enable the citizens to enjoy the rights enshrined in Parts III and IV of the Constitution vide *The Ahmedabad St. Xaviers College Society v. State of Gujarat*, MANU/SC/0088/1974; *Marri Chandra Shekhar Rao v. Dean, Seth G.S. Medical College*, MANU/SC/ 0457/1990 and *Ashok Kumar Gupta v. State of U.V.*, MANU/SC/1176/1997. Under these circumstances, the view of the High Court that the reservations in post graduation specialities or super-specialities are detrimental to the high degree of efficiency and violative of Article 14 is clearly incorrect, erroneous, illegal and unconstitutional. Thus, we hold that the reservation in post graduation speciality or super-speciality is valid under Articles 14,15(1) and 15 (4) of the Constitution.¹⁵

In a word, you can trust the nine judges who decided *Indra Sawhney* and who concluded that reserving seats on the basis of birth in specialities and super-specialities will injure the national interest; or you can trust the three judges who decided *Post-Graduate Institute of Medical Education and Research* and reserve what you will!

I shall revert to the question later whether providing reservations in super-specialities, etc., is an ingredient of equality. For the moment, we need just note that among those who have been most insistent that restricting the ambit of reservations in medical colleges in any way is a denial of equality, are person – specially in the political sphere – who insist that, because of the high office they have held, the state must pay for their medical treatment in the most expensive hospitals here and abroad, hospitals and doctors to which the poor masses can never even dream of having access! Socialism for the masses! Equality – but for others! Indeed, Gandhiji is turned on his head. He taught that the ones who would speak on behalf of the poor, the ones who would lead the people must be the first to bear sacrifice and privation. He would not prescribe for others what he did not do himself. The logic of our leaders is the exact opposite: precisely because they represent those who have been oppressed for centuries, they maintain, they must get the most expensive treatment and facilities! Looking askance at their snatching such facilities for themselves is an affront to those whom they represent! It is to perpetuate the discrimination, nay oppression of centuries!

This way to excellence

In cases of the kind we have been following, the court, as we see, just dismisses the notion that reserving half the seats in a course or a service, and allotting them on the basis not of merit but of birth, will affect efficiency as an ‘unsubstantiated conjecture’. It dismisses the apprehension in the faith that the reservationists ‘will eventually make up for their initial handicaps,’ etc. Propelled by activist judges, the court has gone farther. It has reasoned:

- The Preamble to the Constitution is a part of its Basic Structure;
- The Preamble speaks of equality;

- In practice, this means socio-economic justice, equality of opportunity, equality of status, equality of dignity, equality of political power;
- Socio-economic justice entails economic empowerment of the poor;
- This latter is a Fundamental Right;
- Reservation of posts under the state is one of the modes to provide socio-economic justice to the poor, to empower them economically, to ensure them equality of opportunity, status and dignity, to ensure that they have commensurate political power;
- This mode will be rendered ineffective if reservation is confined to lower post – because power, status, dignity reside in the upper echelons;
- Furthermore, reserving higher posts for the downtrodden is the way ‘to enable the Dalits and Tribes-employees to improve excellence in higher echelons of service’.

The way concepts are deliberately confounded by the progressives speaks to their determination, to put it no lower! In a typical passage we read, ‘Equality of status and dignity of the individual will be secured when the employees belonging to Dalits and Tribes are given an opportunity of *appointment by promotion* in higher echelons of service so that they will have opportunity to strive towards excellence individually and collectively with other employees in improving the efficiency of administration. Equally they get the opportunity to improve their efficiency and opportunity to hold offices of responsibility at hierarchical levels.’¹⁶ Notice how ‘appointment’ and ‘promotion’, ‘opportunity’ and outcome, ‘status and dignity’ and efficiency of administration are all collapsed into one another! But who may question the committed?

As for efficiency of administration and the limitation placed by Article 335, and the duty to pursue and ensure excellence, they vault over these, à la V.P. Singh, by redefining excellence and efficiency. They reason that, indeed, efficiency of administration must be kept in mind, but

- The administrative structure will be efficient only when it fulfils the needs and aspirations of the downtrodden;
- It will be disposed to do so only when the downtrodden have adequate representation in it;

- Indeed, as sharing power is an aspiration in itself, the system will be imbued with merit, it will be ‘excellent’ only when it has empowered the downtrodden;
- Moreover, as power rests in the upper reaches of administration, the system would not have been just by the downtrodden till they have been accorded sufficient representation in those upper echelons of the administrative services.

There is also the twofold mandate that the Constitution imposes on each individual, these judges have argued, standing Article 51A on its head. He must strive for excellence. Second, he must do everything he can to enable the country to attain excellence. These duties apply as much to members of Scheduled Castes and Tribes and Other Backward Classes as to anyone else. It follows that the system must create the conditions in which members of SCs/STs/ OBCs can both attain excellence themselves as well as enable the country to attain ever higher levels of achievement. The sine qua non for their living up to the direction of the Constitution is to get into colleges, into services. But even this will not be enough. As they will not be able to attain their full potential until they occupy the higher posts, and as they will not be able to get into those higher posts unless these are reserved for them, the system must reserve those posts for them by excluding others. As they will not be able to contribute to the country attaining excellence until they occupy the seats in which real power resides, the system must enable them to acquire those seats. Hence, reservations in postgraduate as well as undergraduate courses; reservations at entry as well as in promotions; reservations in all services! And now in the private sector as much as the government. Q.E.D.

Timorousness compounded by principle!

Now, a judge can take Article 335, and maintain,

The Government *must* take into account the *claims* of SCs/STs as ensuring real equality is a fundamental duty of the State, of course bearing in mind that efficiency of administration does not suffer.

Or he can maintain,

While taking into account the claims of SCs/STs, Government *must* bear in mind the effects on efficiency of administration as this is of paramount importance...

And then there are judgments in which the judge deciding with a later case can pick up one passage or the other from an earlier judgment – the more prolix the judge who wrote the original judgment, the more helpful he is in this regard. All the more so because of the mode of argument in many a court – that of head note jurisprudence, so to say. And then there are judgments in which each sentence qualifies the previous one. In *Ram Bhagat Singh v. State of Haryana*, the Supreme Court reiterates that equality can only be among equals, that, therefore, ‘where unequals are competing, conditions must be created by relaxation or otherwise so that unequals compete in terms of equality with respect of jobs and employment of the State.’ It adds:

Those groups or segments of society which are by reasons of history or otherwise unable to compete in terms of absolute equality with the members of other communities or groups in the society, should be ensured and assured chances of competing in terms of equality. They must be helped to compete equally but

And now notice from sentence to sentence,

it is important to emphasise that equality of opportunity is sought to be achieved for the public services or employment. The efficacy and efficiency of that service is of prime consideration.

First one thing,

Equality must be there for all to compete for the public services. Public services and public employment do not exist for providing jobs in terms of equality or otherwise to all. *Public services and -public employment must serve only public purpose and anything that hampers or impairs the efficiency or efficacy of public services cannot and should not be permitted in ensuring conditions of constitutional equality.* These should be done objectively, rationally and reasonably.

And next, the other,

As is often said, it may be that need to ensure equality for Scheduled Castes and Scheduled Tribes should not be surrendered on *the facile and value-based perception of efficiency.*

Then, back to the first,

Yet efficiency must be ensured.

Next, back to the second,

Real equality must be accorded.¹

You may conclude what you will. Either that the court has given sage operational advice: balance the two objectives; or that it has left the matter to be weighed and decided by the executive; or that it has just swung from one desirable to the other, leaving the matter in the air.

But there is a much larger problem. The moral high ground has been wrested by casteists in public discourse and by their counterparts in the judiciary – the progressives who, looking at the ‘reality’ of India as it is, have concluded that here ‘caste is class’. As a result, when it has to take a decision that goes against reservations, the judiciary, even at the best of times, is timorous and defensive. A telling, and typical example can be gleaned from a case concerning the judiciary itself.

Timorous in any case

Most of us think, 'At least, the judiciary has been saved from caste-based reservations.' That is because we do not know the real state of affairs. The Patna High Court was already reserving 14 per cent of posts in the lower judiciary for Scheduled Castes and another 10 per cent for Scheduled Tribes. In 1991, the Bihar government issued an ordinance reserving 50 per cent of these seats for SC/ ST/OBC functionaries. Soon enough, the legislature confirmed the reservation by converting the ordinance into an act. The act was challenged. Eventually, the case came to the Supreme Court.

The Supreme Court struck down the act. The ground on which it did so, and the apologia it offered while doing so tell the tale.

Appointments to the lower judiciary are to be made by the governor in consultation with the high court of the state, the Supreme Court noted. This consultation must be effective. Indeed, the view of the high court about an individual candidate must take precedence, and only when he has overriding evidence to the contrary must the governor depart from the advice of the high court in this regard. Hence, the court ruled, to attempt to set apart posts by passing an act was wrong. If necessary, the governor and the high court could have brought about the fair representation for the concerned classes through mutual consultation.

Even that may not have been necessary, the court said, as the high court, being a high constitutional authority, is itself conscious of its social obligations. It is already, and without a formal law directing it to do so, ensuring 24 per cent reservations for SCs and STs. If the governor had come to the conclusion that another lot must be reserved for OBCs, he could have brought that result about by persuading the high court which, as noted, is in any case alive to its social obligations. 'It is easy to visualize,' the Supreme Court said, 'that the High Court may, on being properly and effectively consulted, endorse the Governor's view to enact provision of reservation and lay down the percentage of reservation in Judicial Service, for which it will be the appropriate authority to suggest appropriate measures and the required percentage of reservation, keeping in view the thrust of Article 335 which requires the consideration of the claim of members of SC, ST and OBC for reservation in Services to be consistent with the maintenance of

efficiency of administration.’ Indeed, the court was pained that some doubted the commitment of the judiciary in this regard. It said:

We really fail to understand as to why the legislature would feel that the Governor, when he frames rules in consultation with the High Court and the Public Service Commission under Article 234 will not take into consideration the constitutional mandate under Article 16(1) or Article 16(4). In fact, in the case in hand in the Bihar Judicial Service Recruitment Rules, 1955, reservations have been provided for Scheduled Caste and Scheduled Tribe candidates and the Full Court of Patna High Court have also adopted the percentage of reservation for these candidates as per the notification of the State Government. So far as the Superior Judicial Service is concerned, it is of course true that there has been no provision for reservation. But such provision could always be made by the Governor in consultation with the High Court, also bearing in mind the mandate of Article 335, namely Maintenance of Efficiency of Administration. *It is indeed painful to notice, some times law makers unnecessarily feel that the High Court or the Judges constituting the High Court are totally oblivious to the Constitutional mandate underlying Article 16 and, more particularly, Article 16(4).* It is also not appropriate to think that the High Court will not take into consideration the provisions of Article 16(1) and 16(4) while considering the case of recruitment to the judicial services of the State. The Judiciary is one of the three limbs of the Constitution and those who are entrusted with the affairs of administration of justice must be presumed to have greater expertise in understanding the Constitutional requirements.²

Of course, in the end the judiciary can only delay the slide downhill a bit. As we have seen, time and again the executive and legislature have overturned judgments of the Supreme Court by changing not just the laws but the Constitution itself. But I am on the defensiveness with which the courts view even the tentative brake that they decree.

Not the candidates, but the criteria are on test!

From this only one step further is required: by how much may standards be diluted? Even when the Supreme Court is confronted with a case of recruitment to the judiciary itself, it in effect urges that the standards prescribed be lowered *sufficiently*. And what is the test of sufficiency? That the reservationists actually get recruited. Here is how it puts the matter in *Ram Bhagat Singh v. State of Haryana*:

We are conscious that high efficiency is required because the recruitment is in the judicial branch, that is to say, for prospective judicial officers who will be in charge of administration of justice in the country. But at the same time, if possible, in order to ensure that there is equality of opportunity, a percentage [the score to be attained to qualify for the post] should be fixed without,

in any way, compromising with the efficiency required for the job *which will be attainable by backward communities*, that is to say, Scheduled Castes and Scheduled Tribes. Unless such a percentage is fixed on the aforesaid basis and a percentage is fixed for qualification which would normally be unattainable by the Scheduled Castes and Scheduled Tribes determined on an objective basis, it would not be possible to ensure equality of opportunity.³

Notice the steps:

- Efficiency is of course vital;
- So, there must be standards;
- But these standards must be such that the reservationists can attain them;
- They can be said to have been correctly fixed only if they actually lead to the recruitment of the reservationists;
- Otherwise, equal opportunity would not have been afforded.

In this case, the court at least left the fixation of standards to the government. Acting on the same touchstone, namely, that the relaxations must be of such an order that they actually result in the recruitment of the requisite number of reservationists, in *Comptroller and Auditor General*, the Supreme Court struck down the standard that had been fixed and declared the relaxation that the CAG had prescribed for reservationists to have been ‘a purely illusory one’. It decreed relaxations that were almost twelve times what the authority which had to discharge the responsibilities had thought permissible, and issued a mandamus to government directing it to add twenty-five marks to the scores of candidates from Scheduled Castes and Tribes.⁴ Fortunately, this particular decision has been overruled by subsequent verdicts.⁵

The way to read the Constitution

The proper role of judges

For it is not just in regard to reservations that the progressive judges have overawed others; it is not just in regard to reservations that the moderate judges have been overawed by what has become the norm in public discourse. The progressives, both in the judiciary and outside, have successfully drilled two basic assertions into the judicial consciousness –

about how we must read the Constitution, and what the proper role is for the judiciary.

When they want to, of course, our judges are as determined to stick to precedent as those of any other country – in instance after instance, the whole ‘reasoning’ consists of morsels from earlier judgments: in these rulings, our courts are ever so deferential to precedent. But when they set out to advance a cause that they have selected, the judges do not let either precedents or even the manifest meaning of the words that the Constitution uses, come in the way.

The Constitution is a dynamic document, they say at such times. It is a living organism. Precedent cannot be allowed to become a straitjacket, they say.

Typical of these perorations are those of Justice V.R. Krishna Iyer. As we have seen, the Railways had decreed reservations at the entrance level as ‘well as in promotions; the latter were to apply to both selection and non-selection posts; reservations were to be not just 50 per cent but 66 2/3 per cent of the posts and vacancies; members of Scheduled Castes and Tribes were to be deemed to have secured a grade higher than they had obtained in their assessments; the seats and posts that could not be filled by the reservationists in a year would be carried over for three years; and so on. The matter had come in appeal to the Supreme Court. We have seen how Justices Krishna Iyer and Chinnappa Reddy gave their seal of approval, and the lengths they had to go to do so. In effect, as we shall notice in a moment, two judges used this case to overrule what five judges had held in *Devadasan*.⁶

How did they justify all this? ‘We, as Judges dealing with a socially charged issue of constitutional law, must never forget that the Indian Constitution is a National Charter pregnant with *social revolution*, not a Legal Parchment barren of *militant values* to usher in a democratic, secular, socialist society which belongs equally to the masses including the *harijan-girijan* millions hungering for a humane deal after feudal-colonial history’s long night,’ Justice Krishna Iyer wrote in explanation.

‘These forces nurtured the roots of our constitutional values among which must be found the fighting faith in a casteless society, not by obliterating the label but by advancement of the backward, particularly that

pathetic segment described colourlessly as Scheduled Castes and Scheduled Tribes,' he continued. 'To recognise these poignant realities of social history and so to interpret the Constitution as to fulfil itself, not eruditely to undermine its substance through the tyranny of literalism, is the task of judicial patriotism so relevant in Third World conditions to make liberation a living fact.' In a word, anyone voicing anything to the contrary is ensnared in 'the tyranny of literalism', he is lacking in 'judicial patriotism', he is shutting his eyes to 'the poignant realities of social history'.

'We could not apprehend the social dimension of the stark squalor of SC & ST by viewing Article 16(4) through a narrow legal aperture but only by an aperçu of the broader demands of social democracy, without which the Republic would cease to be a reality to one-fifth of Indian humanity,' Justice Krishna Iyer declaimed.

'Our Constitution is a dynamic document with *destination social revolution*,' he maintained. 'It is not anaemic nor neutral but *vigorously purposeful* and *value-laden* as the very descriptive adjectives of our Republic proclaim. Where ancient social injustice freezes the "genial current of the soul" for whole human segments our Constitution is not non-aligned. *Activist equalisation*, as a realistic strategy of producing human equality is not legal anathema for Articles 14 and 16. To hold otherwise is *constitutional obscurantism and legal literalism, allergic to sociologically intelligent interpretation*.' Again, anyone holding a contrary opinion about the issue at hand or about the content and nature of the Constitution is prisoner of 'constitutional obscurantism and legal literalism'; he is caught in sociologically unintelligent interpretation!

'Constitutional questions cannot be viewed in vacua,' the judge admonished, 'but must be answered in the social milieu which gives it living meaning. After all, the world of facts enlivens the world of words. And logomachy is not law but a fatal, though fascinating, futility if alienated from the facts of life.' The colleague who adheres to what the Constitution actually specifies, in other words, is mired in 'logomachy', he is deciding things 'in vacuo', he has departed from Taw' and fallen into a 'fatal futility'!

'A constitutional instrument is *sui generis* and, obviously and necessarily, its interpretation cannot always run on the same lines as the interpretation of statutes made in exercise of the powers conferred by it,'

the judge continues. ‘A Constitution, like ours, born of an anti-imperialist struggle, influenced by constitutional instruments, events and revolutions elsewhere, in search of a better world and wedded to the idea of justice, economic, social and political, to all, must receive a generous interpretation so as to give all its citizens the full measure of justice so proclaimed instead of “the austerity of tabulated legalism.” And so, when the constitutional instrument to be expounded is a Constitution like the Indian Constitution, *the expositors are to concern themselves not with words and mere words only, but, as much, with the philosophy or what we may call “the spirit and the sense” of the Constitution.*’ And the judge is in doubt about what ‘the spirit and sense’ are: ‘Here, we do not have to venture upon a voyage of discovery to find the spirit and the sense of the Constitution; we do not have to look to any extraneous sources for inspiration and guidance; they may be sought and found in the Preamble to the Constitution, in the directive principles of State policy, and other such provisions.’ Not in the articles themselves, as in this penumbra!⁷

The activist judges have little difficulty in finding a few lines from a previous judgment when they can be yoked to advance the cause they have determined to advance through the case in hand. And they have as little difficulty in ‘differentiating’ the case at hand from the case in which the court itself had given a judgment that comes in the way of what they want to advance through the case at hand.

In *Indra Sawhney*, the judgment spelt out that reserving seats in specialities and super-specialities would in the end harm every one: the consequence of a botched brain operation will not be less severe for a low-caste man than for a high-caste man. But the activist judge has no difficulty in vaulting over this dictum. First, as we have seen, he confounds subjects with degrees: in *Indra Sawhney*, the court said there should be no reservations in specialities; but the question before us is courses. Hence, those observations do not apply. Second, even while making those observations, the court had left the matter to be decided by the executive. Hence, those observations are not a bar. As this ‘differentiating’ is manifestly insufficient, the judge reverts to the old weapon: he casts doubt on the criterion itself by which merit is sought to be adjudged, without, as is always the case, specifying ways by which those criteria and methods of

assessment may be improved. ‘We are unable to appreciate the argument of detriment to the interests of society,’ he declares. ‘As we have said hereinbefore, there is no distinction in the matter of passing the examination. No one will be passed unless he acquires the requisite level of proficiency. Secondly, the academic performance is no guarantee of efficiency in practice. We have seen both in law and medicine that persons with brilliant academic record do not succeed in practice while students who were supposed to be less intelligent come out successful in profession/practice. It is, therefore, wrong to presume that a doctor with good academic record is bound to prove a better doctor in practice. It may happen or may not.’ Therefore, it will not! Q.E.D.⁸

Similarly, in *Indra Sawhney*, the Supreme Court decided that there shall be no reservations in promotions. Once again, the activist judge has no difficulty in brushing that aside. In *Indra Sawhney*, the court decided a ‘non-issue’, he says:

In Mandal’s case, admittedly, the two Government Memorandums provided for reservation to OBCs in initial direct recruitment in central services. The question of reservation in promotion was a non-issue as conceded in that case itself and across the bar; but the learned judges, with all due respect and deference to their learned view, decided a non-issue, though objected to, on the ground that counsel appearing for the parties had put their heads together and framed the issue and reference was made to a larger Bench so that the issue was decided on that premise though it is settled constitutional law that constitutional issues cannot be decided unless the issue directly arises for decision, with due respect the Bench decided a non-issue on a constitutional law affecting 22% of the national population... It is an admitted case that as there was no issue, nor was any evidence adduced to prove whether efficiency of administration was deteriorated [sic] due to reservation in promotion; nor was it pointed out from the facts of any case...⁹

The fact is that in *Indra Sawhney*, this point had been urged by the then Attorney General on behalf of the government – that, as the order which was under challenge did not prescribe reservations in promotions, the question did not arise in the case. It had been considered by the nine judges. Eight of them, after due deliberation, had pronounced on it, and they had given reasons for doing so. True, the order does not prescribe reservations in promotions, the judges said, ‘But it must be remembered that the reference to this larger Bench was made with a view to “finally settle the legal position relating to reservations”. The idea was to have a final look at

the said question by a larger Bench to settle the law in an authoritative way. It is for this reason that we have been persuaded to express ourselves on this question...' And again, 'Whether reservation can be made also at the time of promotion to a higher post does not directly arise from the impugned Orders, it is too vital an aspect of the concept of reservation under Article 16(4) to be overlooked....'¹⁰ And here we have a single judge declare that what the eight judges did was to pronounce on a non-issue, and, therefore, by implication, what they held ought to be disregarded.

But to proceed. One must not just go by the *words* of the Constitution, the activist judges say. 'The Indian Constitution is a great social document,' Justice V.R. Krishna Iyer declares in another case, 'almost revolutionary in its aim of transforming a medieval, hierarchical society into a modern, egalitarian democracy. Its provisions can be comprehended only by a spacious, social-science approach, not by pedantic, traditional legalism....'¹¹

Grandiloquence is as much a part of activism as hyperbole. Such activist constructions of the Constitution and of what the role of the judiciary must be under it are leavened by both. "Equality of status and of opportunity..." the *rubric chiselled* in the *luminous* Preamble of our *vibrating and pulsating* Constitution *radiates* one of the avowed objectives in our Sovereign, Socialist and Secular Democratic Republic..., Justice Pandian begins. 'Our Constitution is *unquestionably unique* in its character and assimilation having its notable aspirations contained in "Fundamental Rights" (in Part III) through which the illumination of Constitutional rights comes to us *not through an artless window glass but refracted with the enhanced intensity and beauty by prismatic interpretation* of the Constitutional provisions dealing with equal distribution of justice in the social, political and economic spheres,' he avers. 'Though forty-five years from the commencement of the Indian independence after the end of British paramountcy and forty-two years from the advent of our Constitution have marched on, the *tormenting enigma* that often nags the people of India is whether the principle of "equality of status and of opportunity" to be equally provided to all the citizens of our country *from cradle to grave* is satisfactorily consummated and whether the clarion of "equality of opportunity in matters of public employment" enshrined in Article 16(4) of the Constitution of India has been called into action? *With a broken heart*

one has to answer these questions in the negative... ‘ The Founding Fathers of our Constitution have designedly couched Articles 14, 15 and 16 in comprehensive phraseology so that the frail and emaciated section of the people living in poverty, rearing in obscurity, possessing no wealth or influence, having no education, much less higher education and suffering from social repression and oppression should not be denied of equality...’ “The undignified social status and sub-human living conditions leave an indelible impression that their forlorn hopes for equality in every sphere of life are only a myth rather than a reality... this appalling situation and the pathetic condition of the backward classes...”¹²

Magniloquent words justify big-hearted interpretation!

Others have cautioned that once the reins are let go in this fashion, the Constitution will be pushed and pulled any which way, that it will be made to say whatever the particular bench wants it to say; that the approach will do great injury to judicial discipline and, therefore, to the predictability of law. In *N.M. Thomas* itself, Justice H.R. Khanna pointed to the dangers, and, seeing the way entire edifices were being constructed on words of some foreign academic or what some American judge had said in some judgment that was delivered in a very different context, counselled that judges should not go by stray quotations from this thinker or that, howsoever eminent they may be: ‘If one eminent thinker supports one view,’ he says, ‘support for the opposite view can be found in the writings of another equally eminent thinker. Whatever indeed may be the conclusion, arguments not lacking in logic can be found in support of such conclusion.’ In as gentle a way as possible, he counselled against what was happening in the court, and urged that the court avoid a doctrinaire approach. ‘A Constitution is the vehicle of the life of a nation and deals with practical problems of the Government. It is, therefore, imperative that the approach to be adopted by the courts while construing the provisions of the Constitution should be pragmatic and not one as a result of which the court is likely to get lost in a maze of abstract theories.’ In particular, he said, while construing provisions of the Constitution one imperative ‘is to foresee as to what would be the impact of that construction not merely on the case in hand but also on future cases which may arise under those provisions. Out of our concern for the facts of one individual case we must

not adopt a construction the effect of which might be to open the door for making all kinds of inroads into a great ideal and desideratum like that of equality of opportunity. Likewise, we should avoid, in the absence of compelling reason, a course that has the effect of unsettling a constitutional position which has been settled over a long term of years by a series of decisions.’¹³

But the activists will have none of this. We are advancing a revolution, they declare. These constitutional positions have to be overturned precisely because they have remained settled for that long term of years. Convinced that they are the standard bearers of revolution, that they are transforming this medieval, traditional, hierarchical society into a modern, egalitarian democracy, they strain to outdo what preceding revolutionaries have held.

Not words; not even generous constructions put on words; but to elongate further the direction in which the constructions have tended!

One must not even go merely by the liberal constructions of the words of the Constitution in particular cases, they say. One must in addition take account of the *direction in which the meaning that is being read into the words is being extended*. ‘In the interpretation of the Constitution,’ the Supreme Court tells us in *Ashok Kumar Gupta*, ‘words of width are both a framework of concepts and means to achieve the goals in the Preamble. Concepts may keep changing to expand and elongate the rights. Constitutional issues are not solved by mere appeal to the meaning of the words without *an acceptance of the line of their growth*. The intention of the Constitution is, rather to outline principles than to engrave details.’¹⁴

The judge as revolutionist

With this goes the premise that the judge must be an activist and more, a premise that is proclaimed with much grandiloquence. As the court goes on to declare in the same judgment:

The judge must be attune with the spirit of his/her times... The great tides and currents which engulf the rest of the men do not turn aside in their course and pass the judges idly by. Law should subserve social purpose. Judge must be a jurist endowed with the legislator’s wisdom, historian’s

search for truth, prophet's vision, capacity to respond to the needs of the present, resilience to cope with the demands of the future and to decide objectively disengaging himself/herself from every personal influence or predilections. Therefore, *the judges should adopt purposive interpretation of the dynamic concepts of the Constitution* and the Act with its interpretative armoury to articulate the felt necessities of the time. The judge must also bear in mind that *social legislation is not a document for fastidious dialects but a means of ordering the life of the people*. To construe law one must enter into its spirit, its setting and history. Law should be capable of expanding freedoms of the people and the legal order can, weighed with utmost equal care, be made to provide the underpinning of the highly inequitable social order. The power of judicial review must, therefore, be exercised with insight into social values to supplement the changing social needs. *The existing social inequalities or imbalances are to be removed and social order readjusted through rule of law*, lest the force of violent cult gain ugly triumph. Judges are summoned to the duty of shaping the progress of the law to consolidate society and grant access to the Dalits and Tribes to public means or places dedicated to public use or places of amenities open to public etc. *The law which is the resultant product is not found but made.*¹⁵

‘A purposive interpretation of the dynamic concepts of the Constitution,’ ‘Social legislation is not a document for fastidious dialects [sic] but a means of ordering the life of the people,’ ‘The existing social inequalities or imbalances are to be removed and social order readjusted through rule of law,’ a judiciary that does not just ‘find law’ but *makes* it. Banners upon banners. And this is but a representative judgment in this regard.

The court proceeds to pile further adjectives on to this activism. It declares:

The Judges, therefore, should respond to the human situations to meet the felt necessities of the time and social needs; make meaningful the right to life and give effect to the Constitution and the will of the legislature. This Court as *the vehicle of transforming the nation's life* should respond to the nation's needs, interpret the law with pragmatism to further public welfare to make the constitutional animations a reality and interpret the Constitution broadly and liberally enabling the citizens to enjoy the rights...

Therefore, it is but the duty of the Court to *supply vitality, blood and flesh*, to balance the competing rights *by interpreting the principles* to the language or the words contained in the living and organic Constitution, *broadly and liberally*. The judicial function of the Court, thereby, is to *build up*, by judicial statesmanship and judicial review, *smooth social change under rule of law* with a continuity of the past to meet the dominant needs and aspirations of the present. This Court, as sentinel on the *qui vive*, has been invested with more freedom, in the interpretation of the Constitution than in the interpretation of other laws. This Court, therefore, is not bound to accept an interpretation which retards the progress or impedes social integration; it adopts such interpretation which would bring about the ideals set down in the Preamble of the Constitution aided by Parts III and IV – a truism meaningful and a living reality to all sections of the society as

a whole by making available the rights to social justice and economic empowerment to the weaker sections, and by preventing injustice to them. Protective discrimination is an armour to realise distributive justice...¹⁶

Such clarion calls are de rigueur in the reservations' judgments. "The Indian Constitution was described as a document of social revolution which casts an obligation on every instrumentality including the judiciary which is a separate but equal branch of the State to transform the *status quo ante* into a new human order in which justice, social, economic and political will inform all institutions of national life and there will be equality of status and opportunity for all,' the Supreme Court declares in *State of Bihar v. Bal Mukund Sah*. 'The British concept of justicing was found to be satisfactory for a stable and static society but not for a society pulsating with urges of gender justice, worker justice, minorities justice, dalit justice and equal justice between chronic unequals. In the words of Granville Austin, the judiciary has to *become an arm of the socio-economic revolution* and perform an active role calculated to bring social justice within the reach of the common man.'¹⁷

Selective activism

But then, one must not be dynamic and generous and 'functionally involved' in every case! Remember the ringing words of Justice Krishna Iyer about how the court would rush to scotch arbitrariness, to undo injustice? Remember how judges like him would not be deterred by considerations of mere procedure in reaching out both to check the executive and to bring succour to the individual? Remember how judges like him have shrunk the ambit of 'policy' to pronounce on matters? Is it then not a bit of a surprise to read in *Soshit Karamchhari Sangh* the same judge hold, that though 'one may easily sympathise with' those who suffer from the measure in question, for 'They are many in number in the lower stations of life. They are economically backward and burdened with the drudgery of life...', but as the Constitution has cast its preference for the socially backward, 'Who are we, as judges to question the wisdom of provisions made by Government within the parameters of Article 16(4)? The answer is obvious that the writ of the court cannot quash what is not

contrary to the Constitution however tearful the consequences for those who may be adversely affected.’

Of course, he does express hope about what may be done in the eventual future: ‘The progressive trend must, of course, be to classify on the have-not basis but the SC/ST category is, generally speaking, not only deplorably poor but also humiliatingly *pariah* in their lot.’ But this time round, as we have noticed, he is self-denial personified: ‘We are not concerned with that dubious brand...;’ yes, in the long run, the remedy is to liquidate handicaps through constructive projects, however, ‘All this is in another street and we need not walk that way now.’¹⁸

Of course, other facts, equally insistent in the demand they make for intervention, stare at the court. But the Judge will not be deflected. ‘True, the politicisation of casteism, its infiltration into unsuspected human territories and the injection of caste-consciousness in schools and colleges via backward class reservation are a canker in the rose of secularism,’ he allows. ‘More positive measures of levelling up by constructive strategies may be the developmental need. But the judicial process while considering constitutional questions, must keep politics and administrative alternatives as out of bounds except to the extent economics, sociology and other disciplines bear scientifically upon the proposition demanding court pronouncement...’

The very judge who has been delivering orations on how the judiciary must be an arm of social revolution, à la *Theses on Feurbach*, now says, ‘Whether alternative policies should have been chosen by the Government or would have served better to remove the handicaps of the SCs & STs, whether the advantages conferred on these classes are too generous and overly compassionate and whether the considerable numbers of the economically destitute receive the same sympathy as social have-nots categorised as SC & ST – these and other speculative maybes, are beyond the court’s orbit save where Article 16 is hit by these omissions and commissions.’ And, of course, far from it for the court to question the ‘ultra concern that the Constitution makers displayed for Scheduled Castes and Tribes. We must remember, after all, ‘The court functions under the Constitution, not over it, interprets the Constitution, not amends it,

implements its provisions, not dilutes it through personal philosophy projected as constitutional construction...’

Hence, the self-denial: ‘Objective tuned to constitutional wavelengths is our function and if – only if – constitutional guarantees have clearly been violated will the court declare as *non est* such governmental projects as go beyond the mandates of Part III read in harmony with Part IV. If, on a reasonable construction, the Administration’s special provisions under Article 16(4) exceed constitutional limits, it is the duty of the court to strike dead such project.’

But then the caveat for future activism: ‘Even so, while viewing the legal issues we must not forget what is elementary that law cannot go it alone but must function as a member of the sociological ensemble of disciplines.’¹⁹

Recall Justice Krishna Iyer’s ringing orations on Article 335 and the imperative of maintaining efficiency in administration. And in this case? The shrug-cum-caricature we have already encountered: *harijan-girijans* are a microscopic percentage of the services; they could not be affecting the overall efficiency of administration... Hence, the arguments about efficiency and inefficiency are ‘trite’ and ‘a trifle phoney’.

Indeed, only those whose personal interests are affected by reservations rake up such miasmas. After all, even though standards have been falling, the world has continued to go forward. As for the better-off stealing benefits, in one case, Justice Krishna Iyer is full of dire warning – the double injury these better-off do; in this one, he declares that he is not moved by the prospect: the plea is a ‘specious’ one, he says; ‘A swallow does not make a summer,’ he says; maybe the executive would want to attend to this at some future date...²⁰

How telling, in view of this self-denial, is the warning that Justice Krishna Iyer himself gives in this very case: reservations must not be allowed to become a ‘super-fundamental right’, he warns; to lend the reservations policy an ‘immortality’ is to defeat its very purpose and rationale; furthermore, ‘to politicise this provision for communal support and Party ends is to subvert the solemn undertaking of Article 16(1), to casteify “reservation” even beyond the dismal groups of backwardmost

people, euphemistically described as SC & ST, is to run a grave constitutional risk. Caste, *ipso facto*, is not class in a secular State...’

Every word in that warning chastises what the judge is approving in his judgment!²¹

Two points arise. The first concerns the way a judge tilts towards one proposition in one case and its opposite in another, the ease with which what is a mandatory and imperative in one case becomes a ‘trite’ and ‘phoney’ contrivance in another. Second, judges following later can use either one tilt or its opposite to buttress *their* predisposition in the case that has been brought before them.

Soshit Karamchari Sangh is notable for two other reasons also. Since *Balaji* and *Devadasan*, as we have noticed, the court had been holding that not more than 50 per cent of seats and posts may be reserved. In *Devadasan*, the court had actually struck down the carry-forward rule as it resulted in reserving more than 50 per cent in individual years. In *Soshit Karamchari Sangh*, the court had no difficulty in getting around that limit, and in assuring itself that it was conforming to the reasoning and method and indeed the conclusion of the previous judgment – even as it inserted an indefinite, stretchable word into the limit! What shall count is not the intake in a given year, but the proportion that the reservationists have in the total cadre, it ruled. And in that too, the proportion should not be *substantially* in excess of 50 per cent..., and the 66 2/3 per cent reservations which had been decreed and were under challenge were not *considerably in excess of 50 per cent...*!²²

There is another telling fact about *Soshit Karamchari Sangh*. This case was before a three-judge bench. Two judge – Justices Krishna Iyer and Chinnappa Reddy – declared themselves for the propositions recalled above. The third judge – Justice R.S. Pathak – filed a dissent. The result? Two judges overruled what five judges had held in *Devadasan*! And who may question them? After all, the five were just interpreting the world in various ways, the point is to change it!

Yet in this very case, this very judge rejects the plea for reconsideration of *Rangachari*. Now, it is entirely possible that a judge may agree with one case and find another to have been wrongly decided – and accordingly follow the former and overturn the latter. And Justice Krishna Iyer does say

that *Rangachari* has his ‘full concurrence’. But I am on the other reasons he gives for not reconsidering the case. *Rangachari* has been approvingly referred to by the court for two decades, he says, and been acted upon by the government. Was that not just as true of *Devadasan*? Indeed, it had held the field longer. We should not open this ‘Pandora’s box’, says Justice Krishna Iyer, the very judge who ever so often has proclaimed his determination to recast the spectacles through which the Constitution is interpreted. And, as was his wont, the judge elevates his preference in regard to this particular case – *Rangachari* to a principle. ‘Constitutional propositions on which a whole nation directs its destiny,’ the judge declaims, ‘are not like Olympic records to be periodically challenged and broken by fresh exercises in excellence but solemn sanctions, with judicial seal set thereon, for the country to navigate towards the haven of human development for everyone. To play crossword puzzle with constitutional construction is to profane it, unless, of course, a serious set-back to the progress of human rights or surprise reversal of constitutional fundamentals has happened.’²³

I suppose, the caveat in the last few words, ‘unless, of course,...’ is what provides the flexibility to do one thing in one case and its opposite in another.

The ultimate argument

And at each step there is always the ultimate justification – that, if that activist extension is not accepted, there would be hell to pay. ‘An *aware* mass of humanity, denied justice for generations, will not take it lying down too long but may explode into Dalit Panthers, as did the Black Panthers in another country,’ Justice Krishna Iyer warns. Hence, “The case for social equality and economic balance, in terms of employment under the State, cries for more energised administrative effort and a Government that fails to repair this depressed lot, fools the public on *harijan* welfare.’ Therefore, ‘Jurists must listen to real life and, theory apart, must be alert enough to read the writing on the wall! Where the rule of law bars the doors of collective justice, the crushed class will seek hope in the streets. The architects of our Constitution were not unfamiliar with direct action where basic justice was long withheld and conceived of “equal opportunity” as

inclusive of equalising opportunity. Only a clinical study of organic law will yield correct diagnostic results’ – whatever that means.

By stoking expectations beyond what could be fulfilled, by making these stirring perorations and then leaving it to the executive to somehow ‘strike a balance’ between what they have led people to expect as their right and what is required for running an efficient administration, are these judges not themselves making such a reaction more likely?

But such considerations cannot slow down an activist judge out to use the Constitution as an instrument of social revolution. Even as he declares that ‘judicial independence has one dimension, not fully realised by some friends of freedom. Threats of mob hysteria shall not deflect the court from its true accountability to the Constitution, its spirit and text belighted by all the sanctioned materials,’ Justice Krishna Iyer invokes Dr Ambedkar’s ‘tearing down the Republic’ warning. Political liberty cannot exist until it is accompanied by economic and social liberty, Ambedkar had said in his concluding address to the Constituent Assembly. And had declared that we utterly lack the latter two. ‘How long shall we continue to live this life of contradictions?’, Ambedkar asked. ‘How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril.’ Justice Krishna Iyer italicizes the words that followed: *‘We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up.’*²⁴

Given that ultimate argument – this, or violent overthrow – the judge’s prescription for the judiciary itself is a natural lemma: ‘Social engineering – which is law in action – must adopt new strategies to liquidate encrusted group injustices or surrender society to traumatic tensions. Equilibrium, in human terms, emerges from release of the handicapped and the primitive from persistent social disadvantage, by determined, creative and canny legal maneuvers of the State, not by hortative declaration of arid equality.’ And there is the BBC broadcast to invoke: “‘To discriminate positively in favour of the weak may sometimes be promotion of genuine equality before the law” as Anthony Lester argued in his talk in the BBC in 1970 in the series: *What is wrong with the law*. “One law for the Lion and Ox is oppression”.

Or, indeed, as was said of another age by Anatole France: “The law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread.””

Therefore, alliteration, as well as words that give us a glimpse of texts which have inspired all this grandiloquence: ‘Re-distributive justice to *harijan* humanity insists on effective reforms, designed to produce equal partnership of the erstwhile “lowliest and the lost”, by State action, informed by short-run and long-run sociologically potent perspective planning and implementation... The domination of a class generates, after a long night of sleep or stupor of the dominated, an angry awakening and protestant resistance and this conflict between *thesis*, i.e. the status quo, and *antithesis*, i.e. the hunger for happy equality, propels new forces of *synthesis*, i.e. an equitable constitutional order or just society. Our founding fathers, possessed of spiritual insight and *influenced by the materialist interpretation of history*, forestalled such social pressures and pre-empted such economic upsurges and gave us a trinity of commitment – justice: social, economic and political. The “equality articles” are part of this scheme. My proposition is, given two alternative understandings of the relevant sub-articles [Articles 16(1) and (2)], the Court must so interpret the language as to remove that ugly “inferiority” complex which has done genetic damage to Indian polity and thereby suppress the malady and advance the remedy, informed by sociology and social anthropology. My touchstone is that functional democracy postulates participation by all sections of the people and fair representation in administration is an index of such participation....’²⁵

Alas! the perorations may have won the applause of liberal – our vicarious revolutionaries, but, as we have seen, they have met with little more than scorn from others committed to using the ‘dynamic Constitution’ as a ‘purposeful instrument’. Progressives who have followed other progressives have found their predecessors to have been insufficiently progressive! Several judges whose judgments have stretched the limits, who read ever newer meanings into the plain words of the Constitution justified the stretching by invoking the ‘preferential principle’, by invoking the doctrine of ‘protective or compensatory discrimination’. They must have felt that they were decreeing revolutionary advances for the disadvantaged.

To Justice O. Chinnappa Reddy, however, such expressions and the rulings that followed from them smack of superiority, of elitism! In *Vasanth Kumar*, we saw him berate ‘the pitfalls of the traditional approach’ towards the question of reservations ‘which,’ he declared, ‘has generally been superior, elitist and, therefore, ambivalent. A duty to undo an evil which had been perpetuated through the generations is thought to betoken “a generosity and far-sightedness that are rare among nations”. So a superior and patronizing attitude is adopted....’ Citing expressions that figure in the pronouncements of other progressive – the ‘preferential principle’, ‘protective or compensatory discrimination’ – he dismissed them as ‘expressions borrowed from American jurisprudence,’ and declared, ‘Unless we get rid of these superior, patronizing and paternalistic attitudes,’ it will be difficult to truly appreciate the problems and claims of Scheduled Castes and Tribes and other backward classes.²⁶

As for borrowing from the Americans, the progressive judges, including Justice Chinnappa Reddy have no difficulty resting their case on reproductions from Max Weber, R.H. Tawney, Marc Gallanter, and such sterling upholders of the gospel as the American magazine, *Monthly Review*! And, of course, on quotations from judgments of American courts. To say nothing of the *Theses on Feurbach* written by that other westerner!

On the ground

The situation in the field

When controversies broke out over V.P. Singh's decision to implement the Mandal Commission's recommendations, at *The Indian Express* we looked at what was happening in the states. The results were to a pattern.

Kerala conducts a common examination for entrance to medical and engineering colleges. Marks scored in this examination are not normally revealed. Ranks, however, are available.

That year about 20,000 candidates wrote the examination for the 700 MBBS seats available in the state.

A candidate having been born to a 'forward caste' had to rank 412 or higher to get in. A candidate from the Ezhava caste – recognized as a backward one in Kerala – however, got a seat though his rank was 1,605. A Muslim candidate – Kerala has reservations for Muslim 'OBCs' – got in although he ranked 1,752. A Latin Catholic, again an 'OBC, got in although he ranked 2,653. A Scheduled Caste candidate got in although he ranked 4,409. The really fortunate one, of course, was the candidate who could register against the quota for Scheduled Tribes. He got a seat although he ranked 14,246.

Some way to select doctors.

Some way to encourage our youth to strive for excellence.

The pattern is repeated in state after state, my colleagues reported from the state capitals.

To qualify in the corresponding examination in *Andhra*, a candidate from a caste for which there are no reservations had to secure a minimum of 45 per cent, a candidate from a caste for which there are reservations had no minimum to cross.

Chandigarh's prestigious Post-Graduate Institute of Medical Education and Research (PGI) turned out to be no exception. The general category candidate had to secure at least 50 per cent marks, candidates from the Scheduled Castes, Backward Castes and Scheduled Tribes had no minimum to cross. They got in with 20 per cent, 15 per cent and 11 per cent as they had to compete only amongst themselves, i.e., only among those who did not qualify on merit.

In *Karnataka* a Scheduled Caste candidate needed to score 67 per cent to qualify for the medical colleges, an 'OBC candidate 75 per cent; but the one whose caste had not been anointed in this way had to score a minimum of 90 per cent.

In *Madhya Pradesh* that year the cut-off mark for general candidates seeking admission in medical and engineering colleges was 66.6 per cent, but for candidates from the Scheduled Castes it was 35.7 per cent. Nominally, the minimum marks for passing in the state were 40 per cent.

In *Rajasthan* the corresponding figures that year were 65 per cent for general category candidates, 48 per cent for OBC candidates and 42 per cent for Scheduled Caste candidates.

In *Punjab*, 50 per cent for the general category and 25 per cent for the Scheduled Castes.

In *Gujarat*, 60 per cent and 45 per cent.

In *Goa*, 79 per cent and 48 per cent.

For seats in *UP's* engineering colleges the cut-off mark for the merit quota was 64.3 per cent that year. It was lowered first to 60 per cent and eventually to 58.3 per cent. Even so, it remained two-and one third *times* the cut-off mark for candidates in the reserved category, which was 25 per cent!

Tightening for meritorious, letting go for others

It is not just that the lowest qualifying marks for the reserved seats are 10 to 25 per cent lower in state after state. It is that, in practice, because of the intense competition for the ever-dwindling proportion of seats in the open category, the marks a candidate must secure to bag one of these seats far exceed the qualifying barrier. On the other hand, because of the paucity of candidates from castes which have wrested reservations, the marks that a

person aiming for one of the reserved seats need secure fall lower and lower by the year, in many years they have been well below what has been prescribed as the ‘minimum qualifying percentage’.

Thus, in *Bihar*, in the year V.P. Singh, to save his prime ministership, lunged for Mandal, the minimum qualifying marks for admission to medical colleges were 50 per cent and 40 per cent for the open and reserved categories respectively. In actual fact, candidates had to secure 70 per cent and more to make it in the former category, while in the latter case the qualifying marks themselves had to be lowered to 35 per cent, and then to 33 per cent to fill in the quota available.

In UP the qualifying marks for the medical colleges were 55 per cent for the general category and 40 per cent for the reserved quota. In actual fact, candidates in the former category getting below 77 per cent could not get a seat, while in the latter those with 48 per cent did so.

In *Madhya Pradesh* the qualifying mark in the examinations held five years earlier had been 40 per cent. That year, to fill the reservation quotas in medical and engineering colleges, the minimum acceptable mark had been lowered to 25 per cent.

In *Punjab* also the minimum qualifying marks for Scheduled Caste candidates for medical colleges had been lowered from 40 per cent to 25 per cent. In brief,

- We observed vast differences in what is required of candidates merely on account of their birth;
- Severe competition for the seats in the general category was leading to high qualifying marks, and, on the other hand, progressive relaxation of standards to fill up reserved quotas;
- The latter relaxations were being carried to frightfully low levels.

The current position

In the last quarter of 2005, through my friend, Shekhar Gupta, the editor-in-chief of the paper, I requested correspondents of *The Indian Express* to find out whether the state of affairs had improved since the early 1990s. The facts they set out speak for themselves.

In *Karnataka*, 50 per cent of seats in all professional courses are reserved. General merit students have to score a minimum of 50 per cent to qualify for a medical course, those seeking admission against reserved quota get in with 40 per cent. In engineering, the minimum is common – a low 35 per cent. In architecture, the threshold is 50 and 40 per cent respectively. Admissions to professional colleges are based on rankings in the Common Entrance Test. In 2005, for admission to the course in medicine, general merit students who obtained ranks below 540 did not get into the free seats category; while those in the reserved quota got in with ranks as low as *forty thousand seven hundred and ninety-nine*.

Students seeking admission have to take examinations in physics, chemistry and biology. Out of 60 marks, the student who obtained the 40,799th rank, secured 2.75 marks in physics, 6.5 in chemistry and eight in biology. He got in. A student, who secured 34.25, 41 and 48 respectively in those subjects, did not.

In the dentistry course, a student with the rank 31,014 failed to find a seat. A reserved caste student with a rank of 42,493 got it. This latter student scored five, zero, and five marks in the three subjects respectively.

In engineering, there was the phenomenon to which we shall soon turn – unfilled seats. As a result, a student from one of the Scheduled Castes who secured rank 60,079 got admission. He secured zero, 3.5 and zero out of a maximum of 60 in physics, chemistry and mathematics.

The story had been the same in 2004. For the medical course, a student who got 6.5, 12 and 20 in physics, chemistry and biology, and ranked 29,196 got a seat as he was from the reservationists' category. And a student who secured 26.75, 41.75 and 53.25 in those three subjects and ranked 496 was denied a seat as his caste had not been powerful enough to get itself anointed backward.

For the dentistry course, a reserved category student who ranked 35,734 with 6.25, 13.75 and 12.5 in physics, chemistry and biology got a seat, while a general category student, with rank 2,658 and marks 20.5, 27 and 45, was denied the opportunity to study the course.

In engineering, a reserved category student with a rank of 51,117 and 1, 0.5 and zero marks in physics, chemistry and mathematics got admission...

The correspondent from *Jharkhand* reports similar figures. He lists the case of KK, a reserved category student: this student got admission even

though in the 2004 examination he secured two and one marks out of 100 in physics and chemistry. The correspondent lists the case of SH: she got into the engineering college even though she had secured just four marks out of a total of 300 in the entrance examination...

In early 2006, the Supreme Court received a reminder of the situation that has been fomented. N.Senthil Kumar *topped* the entrance test for the Jawaharlal Nehru Institute of Post Graduate Medical Education and Research, Pondicherry. But he was denied admission! Half the seats are reserved for those coming through an entrance test conducted by the All India Institute of Medical Sciences, Delhi, and the other half for reservationist castes. The three-judge bench was 'visibly disturbed', the news agency reported. 'An anachronism has set in,' the additional Solicitor General conceded...

How can it be that criteria and norms which bring about results of this kind shall not affect the standards of education and professional expertise? Directly, by the calibre of persons who are given the scarce seats as against the calibre of those who are denied the opportunity. And, even more so, indirectly, by the effect that such skewed results are certain to have: both on the morale of competent students, and by what they teach students about the value of hard work and the rest – both categories of students, those who qualify to compete only for the general category seats and those who get the reserved category seats, will learn that it is not hard work that counts, it is one's birth.

What a way to be a knowledge superpower!

We should notice one fact in passing. There is one change in a few states since the early 1990s, and it shows one route to a partial cure. Correspondents from Gujarat, Punjab, Maharashtra, and Rajasthan report that in the engineering course, no anomalies of the kind we have noted occur any longer: so many engineering colleges have come up in these states, they report, that seats go abegging. No student is denied admission because of his birth. The problem now is of another kind: persons who have scored zero in their entrance examination, also get admission – with consequences for the quality of tomorrow's engineers. That problem is a critical one; however, it is different from the one we are considering in this essay. But the fact that, in such states, reservations are not resulting in the kinds of anomalies that we have noticed points to one solution – we should

multiply educational institutions and seats, and to that extent at least the injustice arising from excessive reservations will abate.

And yet, there is an obvious limit to this ‘solution’. We cannot replicate it in government services. Or should we? By just going on multiplying government jobs!

In the services

The same pattern, with the same consequences, is by now stamped into the service – up to the highest level of posts.

It is not just that half the seats are set aside at the time of entrance to a service. Seats have to be set aside at *every level* of the service. That is, they have to be set aside in promotions also. And in several branches of government, promotions have got further subdivided into minute compartments by what has come to be known as the *Roster System*.

It is in operation in states like Gujarat and Karnataka where it has already led to rupturing one department after another. Here it is.

Posts in each category at different levels are entered on to a roster. Posts at specified serial numbers are earmarked to be filled *only by persons* who belong to one of the castes for which there is reservation. Thus, for instance, in a department, post number one may be designated to be filled only by a member of a Scheduled Caste, post number four to be filled only by a member of a Scheduled Tribe, etc. Persons from castes which are not entitled to reservations must wait till numbers two or three fall vacant. And, when these fall vacant, they must, of course, contend with *all* employees, including those from the Scheduled Castes and Tribes who are entitled, naturally, as much as anyone else to fill these ‘general’ posts.

Nor is that all. In some states the roster is minutely classified. It is not just that posts number two and four and... may be filled only by, say, a member of the Backward Castes. The Backward Castes have themselves been further classified into subgroup – in Karnataka into five subgroups. So that post number two or seven, as the case may be, must be filled not just by a member of the Backward Castes but by a member of Group A of the Backward Castes. And so on.

In this way, many an employee leap-frog – my colleague in Ahmedabad at the time, M.K. Mistry illustrated the consequence with the case of a

Backward Caste employee getting *two promotions in one day – while others languished. In Delhi, we learnt of a person who joined the service in 1957. Regarded as efficient by all, at the time of our survey in 1992, he was working under a young lady who was born in 1966, the latter having received the manna of accelerated promotions because of her birth.*

And so on.

First: reservations at the point of entry.

Then: reservations in promotions.

Then: reservations in promotions in accordance with minutely classified rosters.

And we are to believe that none of this will affect the efficiency by which government functions.

My colleagues at *The Indian Express* reported the ill effects this has had in state after state, in department after department. The Railways, the medical service in UP, the education set-up in Kerala – in each instance, they found widespread demoralization and resentment among the general category employees, and bitterness between them and the reserved category employees.

Apart from this general vitiation, several specific features stand out.

The first feature arises from the fact that, in spite of relaxed standards, special recruitment drives and all, it has been extremely difficult to fill the quotas set aside for these castes. Naturally, the lucky ones who get in at this stage, leap-frog to the higher posts. Thus, for instance, in spite of strenuous efforts to locate doctors from Scheduled Castes and Tribes, it had been possible in 1992 to fill only 6 per cent of the posts in UP's medical and health department with persons from these castes. But the law prescribed that 20 per cent of promotions shall be reserved for doctors from these castes. As a result Dr 'A' – there is no point in giving the names though these were sent to me – was promoted to the post of joint director superseding 100 doctors; Dr 'B' was promoted to that post superseding 500 doctors; Dr 'C' superseding 900 doctors; Doctor 'D' received the scale superseding 1,600 doctors; Dr 'E' was appointed chief medical officer of a large city superseding 1,100 doctors; Dr 'F' was appointed chief medical officer of another large city near Delhi superseding 1,500 doctors... The result? "The Medical and Health Department of the UP government," wrote my colleague S.K. Tripathi, from Lucknow, 'has been seething with

resentment because of large-scale supercessions which have resulted from having the 20 per cent quota even in promotions...’

The figures had reached startling proportions even in the early 1990s in many instances: all but three of the twenty top posts in the General Education Department in a state, reported a colleague; six of six posts in the highest grade, in a Claims Office in South Eastern Railways, railway employees reported on the basis of documents lodged in courts; twenty-one out of twenty-nine posts in the next highest grade; sixteen of twenty-six posts of office superintendents in a chief works manager’s office in Western Railways... All these had gone to persons because of birth.

As the roster binds the department or enterprise to fill posts numbered such-and-such only by persons from the reserved castes, the minimum requirements which have been specified for those post – for instance, that the person must have served ‘X’ number of years in the preceding post – are routinely set aside for these employees. As are mandatory departmental examinations which are meant to ensure that the person has at least the minimum abilities necessary for the job at the level to which he is being promoted. Railway employees brought me detailed evidence on specific cases. ‘A’ joined as a casual waterman in August 1958; by 1980 he was office superintendent, the highest post in Grade III, not because he had acquired additional skills which his peers did not have, but because of his caste; he would have gone much higher, they pointed out, but for the fact that he was not even a matriculate... ‘B’ was appointed clerk in mid-1958, ranking eighty-four in the ‘seniority list’; by July 1974, having secured four promotions within Grade III, he was promoted as assistant personnel officer in Grade II; by March 1982 he was divisional personnel officer; at the time of our survey, he was on the verge of being promoted to the post of junior administrative officer – again, not because he had gathered additional qualifications over other railway officers, but because of his caste... ‘C’, joined Railways as a *safaiwala*; he was appointed a clerk against a reserved quota post; he ranked 131 in the ‘seniority list’ at the time; within years, leapfrogging over others, he became senior clerk...; he too, a matriculate, was going to make it to being a Class I officer; again not because...

Four consequences are evident:

- Employees inducted against reservations take far fewer years to reach the higher posts than the general category of employees;
- They reach much higher posts by the time of retirement than the latter;
- As they ascend to higher posts when they are still young, the promotion prospects of other – the general category employees over whom they have leapfrogged – are blocked, permanently as far as this generation of employees is concerned;
- Because of these accelerated promotions, because of crash recruitment drives in which persons from reserved castes are inducted directly to higher posts, and because of the pernicious working of the roster system, in several departments an overwhelming proportion of the top posts are now occupied by persons who have climbed up the reservation route.

Table after table from officers

Have things changed since the early 1990s?

I contact officers in Karnataka, MP, Rajasthan, Punjab. And learn, ‘Yes, they *have* changed. They have got much, much worse.’ Data from department after department testifies to this.

Karnataka: The state has decreed 15 per cent reservations for Scheduled Castes and 3 per cent for Scheduled Tribes, a total of 18 per cent. Officers of the Public Works and Irrigation Departments send data about engineers. As against the 18 per cent quota, a quarter of the junior engineers (special grade) and two-thirds of the assistant executive engineers (Division II) are from the SCs/STs. Twenty per cent of both assistant executive engineers (Division I) and executive engineers; 42 per cent of executive engineers; 15 per cent of chief engineers and 30 per cent of engineers-in-chief are from these reserved categories.

The officers report that, because of the operation of the roster, by end-2006, all the posts of engineers-in-chief; 95 per cent of those of chief engineers; 82 per cent of those of superintendent engineers; and 42 per cent of those of executive engineers will be manned by members of SCs and STs. From 2007, all the posts of chief engineers; from 2015, all the posts of superintending engineers; from 2020, all the posts of executive engineers will be manned by these castes and tribes.

They send me a table listing engineers. These joined service between 1982 and 1984. The names are aligned: reservationists and general category engineers who joined at approximately the same date are coupled. Each of the reservationists became an assistant executive engineer between 1991 and 1993. The general category engineers will not attain that grade till 2012 and 2014.

In the Bangalore Water Supply and Sewerage Board, almost 80 per cent of the chief engineers are already from SCs and STs. By next year, all of them will be only from these categories.

The officers in that Board also send me a table. Of the engineers from the general category who joined the service in 1971 to 1974, BPK retired without ever becoming executive engineer; PJSM, BGSS, SS, SRRK got to become executive engineers after twenty years of service, in 2002. On the other hand, TV and SMB, from the reservationist castes, having joined *eight years after* the foregoing, became executive engineers in 1997, that is *five years before* their general category colleagues. Not just that, both of them climbed the next stage and became superintending engineers in 2002. And have since climbed yet another rung, and become chief engineers in 2005!

Officers of the Karnataka Power Transmission Corporation furnish a similar list. As a result of reservations at entry, in promotions, as a result of the operation of the roster system, and as a result of reservationists now getting 'consequential seniority' also, already 28 per cent of chief engineers and 28 per cent of superintending engineers are reservationists. By 2014, all the chief engineers and 61 per cent of the superintending engineers will be from these castes.

Officers from the Public Works Department, Madhya Pradesh, send a corresponding table. It lists general category officers -they joined service between 1979 and 1984. Not one of them has got even one promotion till now: they are consigned to languish as assistant engineers. Then follows a list of engineers who entered as a result of reservations, and have been receiving promotions as a result of reservations. They joined service in 1987. All of them became executive engineers in 2001 and 2002. Four of them became superintending engineers in 2005. They, as well as two more, are scheduled to become chief engineers between 2007 and 2009. One of these becomes engineer-in-chief in 2009, and three in 2010... Between 2010

and 2030, all positions of engineer-in-chief, chief engineer and superintending engineer will be occupied by reservationists. The engineer-in-chief will be *junior* to the *junior-most* executive engineer of the general category...

Lists to the same effect from Punjab and Rajasthan... In the Medical and Health Department of the latter, persons who were so young as to be taught by doctors RPG, GCJ, AS, AC, RPST, BKJ, AS, and a series of others, now lord it over the latter...

The Court's judgments themselves

In fact, one can glimpse enough even from the judgments of the Supreme Court itself to realize the damage that reservations of this order, and inventions like the roster system are inflicting on the quality of educational institutions as well as the services.

In one judgment after another we come upon perversities that have resulted from the successive enlargement of reservations, and from the increasingly complex regulations that have been put in place ostensibly to give effect to the mandate of the Constitution.

In *Ajit Singh v. State of Punjab* and other cases alluded to in that judgment, the Supreme Court, having been presented in the writs with glimpses of what has come about in practice, observes that reservations and the regulations under it should not be pushed to such an extent that they result in reverse discrimination; that they 'should not be pushed to such an extreme point so as to make the fundamental right to equality cave in and collapse'; that 'affirmative action stops where reverse discrimination begins'; that 'the provisions of the Constitution must be interpreted in such a manner that a sense of competition is cultivated among all personnel, including the reserved categories.' The court notes the consequences of one of the devices, the roster system, of the reservation regimen:

Now in a case where the reserved candidate has not opted to contest on his merit but has opted for the reserved post, if a roster is set at Level 1 for promotion of the reserved candidate at various roster points to level 2, the reserved candidate, if he is otherwise at the end of the merit list, goes *to Level 2 without competing with general candidates and he goes up by a large number of places.* In a roster with 100 places, if the roster points are 8, 16, 24, etc., *at each of these points the*

*reserved candidate if he is at the end of the merit list, gets promotion to Level 2 by side-stepping several general candidates. That is the effect of the roster point promotion.*¹

How does this consequence square with what the Supreme Court had in the immediately preceding paragraphs of the same judgment said had to be ensured? That there should be no reverse discrimination; that the fundamental right to equality should not be made to cave in; that ‘a sense of competition is cultivated among all personnel, including the reserved categories’?

The Supreme Court is itself compelled to refer to the consequence as ‘the poignant scenario’ that hobbles so many. A little later in the same judgment we read:

We next come to the poignant scenario in several of the matters before us. *Virpal* referred to such a scenario where *all the 33 candidates who were to be considered for 11 vacancies were from the SC/ST category...* Before us, similar facts are placed by the general candidates. The factual position is not disputed, though certain reasons have been set out by both sides which none has scientifically examined. It is to be noticed that: (i) in *Ajit Singh* itself... as on 30.9.94 *out of 107 officers working as Superintendent Grade I, the first 23 officers are from Scheduled Castes. At the level of Under Secretaries, out of 19, the first 11 are from SC category.* In the category of Deputy Secretary, *out of four, 2 are from SC category.* As on 30.9.94, the position was that at these levels, the percentage was 22.5%, 54% and 67% respectively in the above categories. If the seniority is to be counted as per the case of the reserved candidates, the position would be that Deputy Secretaries would be 100% manned by Scheduled Castes, and Under Secretaries would again be 100% manned by Scheduled Castes while Superintendents Grade I would be so manned to the extent of 53%. (ii) in *Jatinderpal Singh’s* case... *the top 134 positions of Principals (from Head Masters’ source) would be from Scheduled Castes while the top 72 positions (from Head Mistresses’ source) would be from Scheduled Castes.* It is stated that ‘adding this to the number awaiting promotions’, the position would be that top 217 and 111 in these categories would be Scheduled Caste candidate – which would be 200% and 71% (the posts being only 156 under each source). One does not know what will happen in posts beyond Principal, if all persons in the zone are from SC/ST category, (iii) In *Kamal Kant...* as of today: (a) among Deputy Secretaries, *the first 8 posts are occupied by the reserved category* (Scheduled Castes and Backward Classes); (b) among Under Secretaries (Group A) (officiating), 14 posts at the higher levels are occupied by the reserved category. The above factual position is not, in fact, disputed but it is said that this could be because the roster was operated again and again till that was stopped after *Sabharwal* was decided, but no body has gone into the extent to which excess roster operation has created such a situation.²

Once again, as an exercise, read the desiderata that the Supreme Court had spelt out, and assess how the facts the court itself has set out in such cases stack up in the light of those desirables.

In *R.K. Sabharwal*, the Supreme Court tells us:

It is stated in the writ petition that the petitioners are at serial Nos. 19, 23,26,29,30,31,34 and 38 of the seniority list of the Service whereas the respondents are at serial Nos. 46,140 and 152. Respondent Rattan Singh was promoted to the rank of Chief Engineer against the post reserved for the Scheduled Castes *by superseding 36 senior colleagues* including the petitioners. Similarly, respondents Surjit Singh and Om Prakash were promoted as Superintending Engineers against the reserve vacancies *by superseding 82 and 87 senior colleagues* respectively. According to the petitioners at the time of promotion of these respondents the petitioners were already working as Superintending Engineers for several years. It is further averred in the petition that respondents 4, 5 and 6 were in fact working as Executive Engineers when the petitioners were holding the posts of Superintending Engineers.³

Such examples can be multiplied many times over from successive judgments of high courts and the Supreme Court. The situation continues to be exactly the same in 2006, correspondents of *The Indian Express* tell me. From state after state, they list instance upon instance that testifies to the consequences that the roster system is inflicting on individuals, consequences that have affected the efficiency as well as the morale of services.

From *Gujarat*, we have the case of BG, a candidate who got in through the quota reserved for tribals in 1978. She joined as a section officer. She is today an additional secretary because of successive out-of-turn promotions she has obtained along the way because of the roster system. Her 16 batchmates are stuck at lower levels.

In *Punjab*, the State Electricity Board has been well-nigh split because of this system. Once the eighty-fifth amendment is implemented, the staff say, twenty-one of the total twenty-eight posts of chief engineers will get occupied by persons who have come up through the reserved categories. With higher posts getting preempted, of the 110 superintending engineers who were in position in the last quarter of 2005, just ten would get a promotion – the rest would have retired before their turn comes for promotion.

In *Karnataka*, promotions in the government service are done according to a thirty-three-point roster system – every seventh vacancy in a department is to be filled by promoting a Scheduled Caste candidate, every thirty-second vacancy by promoting a Scheduled Tribe candidate. As a result, to cite a typical instance, ‘X’ who joined the Police Department in 1970 has been overtaken in seniority by sub-inspectors who joined *nine years later*. ‘Y’ was promoted to the rank of superintendent of police in 2004 while those who joined through the reservation route *nine years after him* have been superintendents of police *for five years*. Incidentally, *already fifty of the seventy-six SP-level posts in Karnataka are now occupied by reserved category candidates*.

In *Uttar Pradesh’s* power set-up, reports *The Indian Express* correspondent, there are around 3,000 engineers. Of these 650 are from the reserved category. There are ‘anomalies’ galore. For instance, he reports, while officers belonging to the *1974 batch* of engineers of the general category have just about managed to become executive engineers in 2004 – 05, and the *1972 batch* have reached just the deputy general manager’s level, Scheduled Caste candidates of the *1982 batch* have become general managers, and Scheduled Caste candidates of the *1989 batch* have become deputy general managers. Similarly, Scheduled Caste officers of the *1997 batch* are already executive engineers, while officers from the general stream who joined in *1985* are still assistant engineers.⁴

In *UP’s* Irrigation Department, assistant engineers of 1978 vintage are yet to be given their first promotion to the level of executive engineers. Scheduled Caste engineers, however, who joined four years later, in 1982, are already superintending engineers and chief engineers.

The correspondent from *Madhya Pradesh* lists a typical case from the state. ‘X’ joined the Directorate of Public Relations as information assistant in 1991. According to the roster, he was placed sixth in the list of probable promotees. ‘Y’ had joined two years later through the reserved category. He was placed twenty-first. Even though he was placed sixteen places behind ‘X’, and even though he had joined two years later, ‘Y’ has just been made assistant public relations officer. ‘X’ not only continues to languish in the original post, he is likely to continue to be at this level four years from now...

In *Jharkhand*, the results are before the courts. A typical case they are examining is that of SKS, a 1980-batch officer. In the merit list of the then combined state of Bihar, he figured in the top twenty. SS and JT figured in the bottom twenty. But the latter two are from a reserved category. Today, because of reservations in promotions also, SS and JT are joint secretaries and, therefore, the bosses of SKS who continues as deputy secretary.

I seek figures through my friend, Harivansh, the distinguished editor of *Prabhat Khabar*, the leading paper of Jharkhand. What has come to prevail in practice, caveats in *Indra Sawhney* and the like notwithstanding, cannot but harm the efficiency of administration. In addition, meteors descend. In May 2001, the Jharkhand government decreed that instead of 50 per cent of posts being reserved, 60 per cent shall be reserved. The decision went up to the high court. It struck down the decision, and directed that the reservation be scaled back to 50 per cent. But another factor was in operation at the time: the state had just been carved out of Bihar, and the services had been divided between the two new states. The combined result of the partitioning of the services, the reservations policy, and, most important, the operation of the eighty-fifth amendment of the Constitution was that by early 2006, 78 per cent of joint-secretary-level vacancies, and 64 per cent of deputy-secretary-level vacancies had been given to members of Scheduled Castes and Tribes. Similarly, in the finance service of the state, 60 per cent of the joint secretary posts had come to be occupied by persons from Scheduled Castes and Tribes. The point here is most emphatically not that they should not be occupying posts at these levels. But that they had come to occupy this proportion of posts because of the accident of their birth, and because of the operation of the way the Constitution has come to be interpreted and altered.

The Indian Express correspondent in *Rajasthan* reports several cases of the same kind. Dr JS is a 1982-batch doctor. He is assistant professor at a medical college in the state. He has not received a single promotion since he joined twenty-three years ago. Three of his students are professors, thanks to reservations in promotions. Similarly, Dr RA is assistant professor, surgery. Half a dozen of his colleagues and students have become professors. RKJ is still an upper division clerk in the Rajasthan State Secretariat Service after thirty years of service. But BSM, who joined as

lower division clerk through the reserved categories just two years before RKJ, has got four promotions and is today a deputy secretary...

The correspondent in *Guwahati*, reports that such anomalies 'are very common' in Assam...

Do not get me wrong: I rebel against notions of seniority, etc., criteria by which government servants get a right to secure some post or seat automatically, irrespective of their work, irrespective of whether they have qualifications for the job that has to be done. If seniority is disregarded because a person lower down on the seniority list is better able to do the job at hand, he *should get* the job compared to one who is higher on the seniority list but is demonstrably less qualified for the task. But in each of these instances, the persons who have leapfrogged have done so solely because of their birth. There is not even the claim that they have leaped over the others because they are more meritorious. What are we encouraging, what kind of conduct and effort are we inducing when a person 140th or 152nd on the list is promoted over the head of one who is number nineteen – *because the former was born to one set of parents rather than another?*

But one can be certain to find in the judgments of the highest court passages by which one can legitimize the relaxations of standards and the resulting anomalies. In *Indra Sawhney*, the majority held that the 'larger concept of reservations takes within its sweep *all supplemental and ancillary provisions as also lesser types of special provisions like exemptions, concessions and relaxations*, consistent no doubt with the requirement of maintenance of efficiency of administration – the admonition of Article 335.' The judges draw this inference from the use of the word 'any' in Article 16(4). The article, it will be recalled, lays down, 'Nothing in this article shall prevent the State from making any provision for the reservation of...' 'Here the use of the words "*any provision*" for the reservation of appointments and posts assume significance,' the judges say. 'The word "*any*" and the associated words must be given their due meaning. They are not a mere surplusage.'⁵

That apart, how can it be that such 'relaxations' are foisted on a system, and standards in the classrooms still remain unaffected?

Nor will standards survive any better in services. It does not require rocket science to see that it would not be necessary to set aside half the seats in a course or in a service if the reservationists were well equipped to compete for them. The very fact that the rest of the population has to be barred from competing for these seats itself shows that persons for whom these seats are being reserved do not have the requisite qualifications at the time of selection. Remember also that if a person from a caste that has been anointed as 'Backward' or has been put in the schedule qualifies on his own in the 'general list', he is automatically *not* counted against the reserved quota. Hence, those who are inducted in the reserved quota are *by definition* ones who would *not* get in but for the reservations. This being explicit in the very scheme of reservations, how can our judges maintain that efficiency will not be affected?

Three points are noteworthy:

- The reservationists have got to leap over the others not because they displayed greater proficiencies but because of reservations and the related paraphernalia – the roster system, and the like.
- They know this, and so do the others: how can the outcome not affect morale and discipline, indeed the entire work culture in the services?
- The persons who have leapfrogged are young: as a result, they will occupy all the available senior positions for year – the general category employees will never reach those senior posts for no fault of their own except their birth.

Only two facts need to be added.

These consequences had ensued when reservations were only 22.5 per cent or thereabouts. Since then, reserving half the positions has become the norm.

Second, at that time in most states the quota in promotions was limited to Classes II, III and IV alone. An employee could avail of these accelerated channels only up to the starting point of Class I posts. Since then, the Constitution itself has been amended to prescribe that quotas shall be set aside for promotions '*at all levels*'. Imagine the situation then when posts of secretaries and additional secretaries to government are packed in this way and to this extent – as they must inevitably be when the roster is put in

operation; when they are packed, that is, by persons who by definition lack the qualifications necessary for the job.

In view of such facts, what will the Supreme Court say as it recalls the warning which even so progressive a judge as Justice P.B. Sawant had given in *Indra Sawhney*? Reread the words cited above at pages 193 to 197. Has his warning not come true? Exactly as he had forecast, the general category employees are seething with a sense of injustice, and the reservationists have no goad to put in their utmost – they are going to leapfrog over the others in any case, performance or no performance. Nor are the resulting mal-effects confined to individual employee – exactly, as Justice Sawant had warned, administration depends on the entire atmosphere in which the apparatus of governance functions, and it is this atmosphere which has got vitiated: services have got divided on caste lines; officials are convinced that merit and performance do not count; officials dare not speak or write the truth about bad conduct or poor performance of a subordinate, lest they be accused of harbouring a prejudice against persons of some caste.

A basic feature of the Constitution

This essay deals primarily with Articles 15 and 16. But we must remember that many of the same sorts of considerations apply to Articles 330 and 332. Under them, out of a total of 543 seats in the Lok Sabha and 4,091 seats in the state Assemblies, 120 and 1,081 seats are reserved respectively for Scheduled Castes and Tribes. The seats are further split between Scheduled Castes and Scheduled Tribes. For instance, of the 120 seats reserved in the Lok Sabha, seventy-nine are reserved for Scheduled Castes and forty-one for Scheduled Tribes. Candidates belonging to these categories alone can stand for elections from these constituencies.

Four features tell the tale. First, as we saw, Gandhiji had to agree to this kind of reservation in 1932 to head off the British government's Communal Award. At that time, it was understood that the seats would be reserved for twenty years. The reservation would have expired in 1952. In fact, it has continued to this day – indeed, no one dare even contemplate a date, howsoever distant in the future, when reservations in legislatures will be ended.

Second, legislators who are elected as a result of such caste-based reservation see themselves primarily as persons from that caste category: they meet and function as a caste-block, across party lines. That has immediate consequences for legislation as well as for policy: all parties have to bend to the block, all the more so when legislatures have become as splintered as they have today. The more they function as a caste block, the more these legislators are able to get their way. The more they get their way, the more their caste identity is reinforced – in their eyes, in the eyes of their voters, in the eyes of the executive.

Third, members of these caste and tribal groups are said to constitute 20 to 30 per cent of the electorate in these reserved constituencies. As they alone can stand from them, the 70 to 80 per cent of non-SC/ST voters who reside in these reserved constituencies in effect lose their right to represent the voters of the constituencies.

Fourth, within the general Scheduled Caste and Scheduled Tribe category, the dominant sub-caste or tribal group, say, the Meenas in Sawai Madhopur, corners and is able to perpetuate its hold over the seat for decades.

Each of these features strikes at the fundamental premise of representation – that is, at the basic feature of the Constitution. And yet, as of now, there is no prospect at all, that any corrective will be initiated any time in the foreseeable future.

The real way

The state structure and beyond

As will be evident, in the end, their prescription is little more than a tautology: it does not just flow from, it is embedded in the assertions of the progressive judges, in the very meanings they read into words. But there are also basic differences between their point of view and that on which this book is based.

- *Manusmriti*, as we have it, is estimated to have been collated over 700 years: which passages in it are from the original, which are later interpolations? Interpolations by persons of what authority?
- Was India ever what stray verses in Manu suggest it ought to have been?
- Is India today what those stray passages suggest it should have been two thousand years ago?
- Assume that ‘the reality of India today’ is what progressives say it is, should we focus on ‘reality’ as it is today, or adopt such measures as will erase the blemishes that mar that ‘reality’?
- Assume that the wrong and in justice have persisted for centuries, can it be eliminated in a few years? Will steps to ensure that it is eliminated within a few years not result in the very sorts of distortions and inequities and derailments that have been seen so often in history, including the recent history of regimes that set themselves up in the name of Justice and Equality?
- Does the Constitution aim at equality of opportunity or of results? Is the ‘equality of results’ not another will-o’-the-wisp? One in pursuit of which anything and everything can be justified, justified to any extent, and for any length of time?

- Will the extent to which these progressives insist we focus on equality not bury other values enshrined in the Constitution?
- Is the best way of improving the lot of the dispossessed to equalize, or to ensure growth?
- Is the purpose of a provision such as Article 16(4) to just enable the state to take measures to induct the disadvantaged into the apparatus of government or is it a command to do so?
- Is the objective of such a provision a radical redistribution of power?
- Are the disadvantaged better helped by getting half the seats in government or by an administrative mechanism staffed by the very best?
- Is setting aside half the jobs the way to help them, or is it the slew of measures that will raise their capacities to perform those jobs?
- Does the Constitution allow special measures to help the disadvantaged, or does it demand that the more skilled be weighed down by handicaps?

The central difference concerns a pragmatic judgement. I believe that the judges have grossly underestimated, indeed they have disregarded a central lesson of recent history: discourse and politics, eventually interests and power, congeal around the criterion or programme that is deployed by the state. By legitimizing a programme based on caste, they have perpetuated a tumour. They have not just slowed down growth, they have lowered norms of conduct, and thereby harmed the very ones whom they wanted to help. They have done worse: they have lent their hand to dividing our people and country.

Caveats waived aside

The Supreme Court has, or at least a few judges in it have often listed several caveats that must be observed while instituting reservations:

- The provisions are merely enabling ones, they do not confer a right on individuals and groups, they do not confer a duty on the state.
- Reservations must subserve, and must be shown to subserve to the satisfaction of the court, the object of the constitutional provision – for instance, of Article 15(4) in the case of reservations in educational institutions.

- The reservations must subserve ‘other vital public interests’ and ‘the general good of all’.
- Maintenance of efficiency of administration is a sine qua non, and the caution must always be borne in mind that the scheme does not dilute this efficiency; Article 335 is an overriding mandate, ‘An inefficient administration betrays the present as well as the future of the nation’; any reservation made in disregard of this command, ‘is invidious and impermissible’. ‘The State has a vital interest to uphold the efficiency of administration;’ ‘To ignore efficiency is to fail the nation’; efficiency of governance is ‘a compelling State interest’; ‘To weaken efficiency is to injure the nation.’
- The reservations must not be to such an extent and of such a sort that they cause reverse discrimination.
- There should be no reservations in certain services, in higher positions, in specialities and super-specialities as departing from merit in these will inflict grievous costs on all, including the disadvantaged.
- ‘The provisions of the Constitution must be interpreted in such a manner that a sense of competition is cultivated among all service personnel, including the reserved categories.’
- Reservations are a transitory measure. As ‘the social backdrop changes,’ and changing it is ‘a constitutional imperative’, ‘as the backward are able to secure adequate representation in the services,’ reservations will not be required. They must be devised and implemented in such a manner that they do not become ‘a super-fundamental right’. The test of a reservations policy is how soon it obviates the need for such special measures...¹

But each and every one of these restraints has been blown up – by the political class, and by successive activist judges. By now,

- As the judiciary must be ‘an arm of the socio-economic revolution’;
- As the Constitution is an instrument – a living, dynamic, purposeful instrument – of this revolution;
- As this revolution requires that those who have been disadvantaged be pulled up;

- As that pulling up can happen only when they have access to government posts;
- As for this purpose, the state must ensure equality of opportunity so that no one is discriminated against on grounds of caste, religion, sex, etc.;
- As equality of opportunity will be a sham unless outcomes are equal;
- As merely removing discrimination in entering government posts will not enable the downtrodden to occupy those posts, and equality will remain a sham unless up to half the posts are reserved on the basis of birth;
- As power and status reside only in the higher government posts, and as the downtrodden will not be able to acquire these on the basis of merit – measures of ‘merit, and those who are to assess it being perverse – up to half of the higher posts too must be reserved for persons on the basis of their birth;
- As, in spite of such reservations, it may not be possible to find an adequate number of candidates from among the SC/ST/ OBCs, the standards should be diluted to the extent that will yield the number of ‘qualified’ candidates;
- As even after doing so, it may not be possible to find enough persons to man the posts, the vacancies should be carried forward...

Features

Several features of the course that the judgments have followed stand out.

First, over the years, this cascade of propositions has been the handiwork of just a few judges. They appropriated the high moral ground, and, as we have seen, stigmatized and pasted motives on to anyone who did not submit to their assertions. Recall the diatribe with which the contrary point of view is dismissed as the ‘vicious assumption typical of the superior approach of the elitist classes’, as nothing more than a reflection of ‘the age long contempt with which the “superior” or “forward” castes’, as nothing but the ‘crystallization of unfair prejudice’, as a conspiracy of racist Aryans, no less...

Second, the ‘reasoning’ of the handful among them who have delivered the most consequential of these judgments in the last few years has more

often than not consisted of no more than repeating again and again a few passages from the perorations of an even smaller number of their activist predecessors. And the latter, even as they declaimed against the influence of foreign jurisprudence on Indian courts, ever so often relied on some stray passage from a foreign magazine or broadcast or judge.

Third, several warts mar some of the judgments:

- Judges often counsel caution, often in strong word – as they do when they affirm that the efficiency of administration prescribed in Article 335 is an overriding value; and in the next breath they approve the scheme that the government has instituted, a scheme that clearly flies in the face of the caution that the judges have just enunciated.
- To this day, the widest possible differences remain among judges even on elementary questions.
- Almost no attempt is ever made to locate even the flimsiest empirical basis for assertions. The assertions, in turn, are just ejections born of predisposition, even, going by the hyperbole in some of the judgments, of exhibitionist ‘commitment’, to put it no lower. The result is predictable: as in other types of cases, the outcome often depends, not so much on the facts or the law, nor even on provisions of the Constitution, as on the bench before which the case lands.

Fourth, the others who sat with them on the benches during those hearings just went along. Did they do so because they agreed with that line of ‘reasoning’? Did they do so because, like much of the middle class, they too had internalized guilt? Did they go along because they were just a loose, changing collection while the progressives were a well-organized charge? Or did they go along out of a moral pusillanimity, out of the apprehension that, if they did not, they would be dubbed anti-poor?

Indeed, as the years went by, as we have seen, those who set themselves up as the champions of the downtrodden became overtly, audaciously aggressive. When they did not get their way in one forum, they set out to use another. Their colleagues bent over backwards to prove their ‘neutrality’ and ‘compassion’ by not standing in the way!

A typical and telling illustration is provided by what happened in drafting the report of the National Commission that was set up to review the

working of the Constitution. So blatant was the manoeuvre to smuggle passages into the report, passages which went contrary to what had been decided that the principal author of the report, Dr Subhash Kashyap, was compelled to himself record a note of dissent. As Kashyap records, the text on reservations that incorporated what had been decided during discussions, and which was approved by the Commission's Drafting Committee was as follows:

The Commission noted that the ultimate aim of affirmative action of reservation should be to raise the levels of capabilities of people of the disadvantaged sections and to bring them at par with the other sections of society. Reservations should not separate certain sections from others and should not become a permanent feature of Indian society. In this connection, it is important to recall that Dr Ambedkar was opposed to reservations for Scheduled Castes in perpetuity. He would have liked it to be for forty years instead of ten years but thereafter he did not want Parliament to have the power to extend it by law because he did not like the *dalit* class stigma on Indian society to become permanent. Unfortunately, during the last fifty years and more, reservations have not enabled these disadvantaged sections come closer to others to desired levels. Reservations have also not really benefited those sections for whom these were meant. In many instances, these have been monopolized by certain privileged sections within those groups.

Instead, the passages that appear in the body of the report propose that all laws relating to reservations be placed in the Ninth Schedule – so that they are completely beyond judicial review! They counsel that the state can institute reservations for minorities identified on the basis of religion without amending the Constitution, that it can institute them under Articles 14, 15 and 16 as they stand!² When I inquire who was responsible for these changes, Dr Kashyap names an activist judge we have encountered.

Fifth, as such activism, indeed aggression and brazenness, have coincided with the progressive delegitimization of the political class, a delegitimization that has pushed it to pander more and more to sectional interest – like the SCs/STs/OBC – the three wings of the state – the activists in the judiciary, the legislature and the executive – have stoked and justified the worst instincts of each other to produce the excesses in which the polity is trapped today.

As a consequence, what were *enabling* provisions have become mandatory provisions. Indeed, they have become mandatory minima! That the provision mandating the removal of discriminatory laws and regulations

shall not stand in the way of the state taking special measures for lifting the downtrodden became first the duty to take special measures. That became the duty to reserve jobs for those who would not qualify on their own. That became a *right* to be considered for higher posts also. The right to be considered for the higher posts has become a fundamental right to *occupy* those posts. The result is that if, during the course of writing his annual assessment report about Y, who happens to be an SC/ST/OBC, X says that Y does not deserve to be promoted, X is trampling upon the fundamental right of Y. Hence, a very heavy presumption falls upon X which he must discharge to the satisfaction of Y and his champions that he, X, is not propelled by an anti-SC/ST/OBC prejudice.

Nor are we anywhere near the end. An entirely predictable sequence has been enacted again and again. Induced to pander to yet another section, the executive and legislature have often passed a law pleading helplessness – *‘Bhai, vote ka takaazaa hai, itni baar samjhaane pur bhi tum samajhte nahin’* – and saying in private that the courts will strike it down in any case. But by the time the courts have struck down the law or government circular, the need to pander has climbed even higher so that the executive and legislature have just ignored the judgments, indeed they have gone farther and amended the laws and even the Constitution to get over the dykes that the courts had tried to save.

Make-believe

We comfort ourselves: at least, the virus of reservations has not got into judicial appointments; at least, reservations have not been extended to Muslims and Christians. Both notions are just make-believe.

As the Bihar case illustrates, in several state – Gujarat, Haryana, Karnataka, Jharkhand, Rajasthan, to name a few apart from Bihar – appointments to the lower judiciary are already based on a quota system. In states such as Tamil Nadu, where formally there is no quota system, by convention governments allocate posts in the lower judiciary among different castes. Nor is the impact of this practice limited to what we call the ‘lower judiciary’. The years a person has spent at that level become an important consideration while selecting judges for the higher levels. The case of one high functionary became quite notorious as he just would not let

some appointments to the highest court get through till a particular person from a particular caste group was included among them. The mal-effects go beyond, far beyond mere selection of personnel. The whole universe of litigation gets darkened as litigants begin to look upon one set of judges as ‘our men’ and another set as ‘their men’.

As for reservations not having been extended to members of religions that repudiate caste – Islam, Christianity, Sikhism – again, that is but make-believe. The chairman of the Minorities Commission, my friend Tarlochan Singh, sends me a list of fifty-eight castes and of fourteen tribal groups, Muslim members of which have been given reservations. Even those who convert to one of these religions, continue to remain entitled to reservation. The rule in Tamil Nadu is that if the name of the father falls in the lists of Backward Castes/Most Backward Castes/Scheduled Castes/Scheduled Tribes, then, even if the person has converted to another religion, he remains entitled to reservations. In Gujarat, members of Backward Castes continue to avail of not just reservations but even of advantages under the roster system after conversion – 137 castes and sub-castes have been listed as socially and educationally backward in the state; of these, twenty-eight belong to the Muslim community. In Karnataka, ‘caste *at birth*’ is the norm. In UP, several Muslim castes are included in the reservation list – Lalbegi, Mazhabis, even Ansaris. The position is no different in Madhya Pradesh, in West Bengal. *The Indian Express* correspondent in Kolkata reports that the government of the ostentatiously secular CPI(M) strained to have reservations in government service as well as educational institutions extended to Muslims qua Muslims, and directed the state Minorities Commission to ascertain how such reservation had been decreed in Andhra Pradesh. The plan has had to be deferred for the time being, he writes, Only because the Andhra Pradesh High Court has struck down the Andhra order as unconstitutional.

Even as moves are afoot to get the Andhra judgment reversed, the government has directed the armed forces to count soldiers and officers by their religion. Nor is this move an inadvertence. It has arisen as a result of a committee that the government has appointed under a former chief justice of Delhi, Rajinder Sachar -each member of which has been carefully selected for his ‘secular’ beliefs. Each term of reference on which it is to supply information and make recommendations, as we noted at the outset,

has been just as carefully selected to justify reservations and other concessions to Muslims as a religious group.

With elections looming, in January 2006, the Government of Kerala announced another ‘package’ of reservations for backward castes and for Muslims: service rules of the state shall be altered to permit direct recruitment of these sections so as to fill the 40 per cent quota that has been set aside for them; if suitable candidates are not available from these sections, the vacancies shall not be filled by merit; the state Public Service Commission shall prepare an ‘additional supplementary list’ so that the vacancies may be filled only by these sections; 20 per cent of the seats shall be reserved for these castes in graduate and postgraduate courses in government colleges; the chief minister will himself monitor the implementation of the reservation policy; there shall be a permanent commission to ensure that reservations are fully filled...

With elections upon them, the DMK and its allies announced in Tamil Nadu that, once in office, they will bring forth legislation to give reservations to Muslims and Christians.

The Jharkhand government, in turn, has announced that members of thirty-two tribes that are the most backward – literacy level among nine of them is said to be just 10 per cent – shall be directly recruited into government service; those among them who pass the graduation examination shall not have to take the qualifying examination which all others who enter government service have to take.

And beware, the progressive judges have already put out the basis for extending reservations to Muslims or Christians as Muslims and Christians. The word that the Constitution uses is ‘communities’, the word it uses is ‘classes’, Justices Jeevan Reddy, Sawant and Thommen hold in *Indra Sawhney*. ‘Community’ and ‘class’ are wider than ‘caste’, they say. So, entities wider than ‘caste’ can certainly be subsumed under them, they say – the only proviso being that the groups so identified be ‘backward’. Second, in spite of the teachings of Islam, Christianity and Sikhism, castes persist in these religions also, they explain in justification. As that is the reality, it would be invidious to restrict access to reservations to the backward sections of Hindus alone...³

As we have seen, the ninety-third amendment has overturned the decision of the Supreme Court, and given power to the state governments to specify a proportion of seats that even private colleges which are receiving no assistance from government must reserve. The Ministry of Human Resource Development has followed that up by decreeing that the IITs and IIMs, among the last few islands of excellence, must also set aside 49.5 per cent of their seats to be filled by birth rather than by merit.

And it is more than reasonable to forecast that before the next elections, as a run-up to them, the present coalition will introduce a bill to extend reservations to the private sector as a whole. The Ministries of Law and Social Welfare are reported to have already taken the position that reservation can be extended to cover the private sector by changing Article 19(1)(g), passing a law mandating it and putting the law in the Ninth Schedule – thus putting it, like the Tamil Nadu law decreeing 69 per cent reservations, beyond judicial scrutiny. When the matter comes up for vote, every political party will issue three-line whips to make sure everyone notices that it is as committed to reservations as the ruling coalition...

Inexorable

There is an inexorability about such a juggernaut, an ineluctable inner logic:

- Introduced as an exception, the measure swallows the rule;
- Given as a concession to one, perhaps deserving group, it is grabbed by one group after another, by one progressively more undeserving group after another – recognition of Jats as a backward caste has set the stage for complete Mandalization of Rajasthan, a conscientious civil servant reports; Gujars have begun demanding, ‘If such a strong community as Jats are backward, why not us?’;
- Introduced in one sphere, it spreads to others, exactly as a cancer cell taking root in one organ multiplies and invades others;
- In its application to the original group, as well as in its appropriation by others, in its application to the original sphere as well as in its extension to others, the measure suffers progressive, rapid debasement;
- A concession becomes a right, a ceiling beyond which it is not to be given becomes the floor – the level which it is the right of everyone

- who can grab to have;
- The floor, the minimum which everyone takes to be a right becomes the base from which one should wrest more;
 - A concession once made cannot be retrieved, a standard once relaxed cannot be restored;
 - At first efforts are made to arrest the rotting, to ensure that the measure adheres to the purposes for which it was meant, to pare away the manifest excesses; some brave souls even attempt to introduce an element or two of reform; the juggernaut crushes the attempt, and soon even the effort at reform is abandoned, even the pretense that what is being done has some nexus with the objective for which the exception was originally made is shed;
 - Guardians, such as the courts, who are meant to ensure that the exception shall subserve the end for which it was meant, instead take to rationalizing the advance of the juggernaut;
 - What was meant to be a temporary exception thus becomes a permanent millstone, in the end one that pulls the entire society down.

The Communal Award was such. Caste-based reservations have been such.

Government work

Half the entire state structure is thus to be manned by persons who are by definition not qualified for the job.

‘*Arey bhai*, but what is government work?,’ one of these leaders asked me, I reported at the time, as he and his colleagues rammed Mandal down on the polity. ‘It is just pushing files.’

That is what we have made it. And that is one of the major reasons on account of which the state apparatus has fallen so far below what is required.

Just ‘pushing files’?

Governance is not ‘just pushing files’.

Government impinges on every aspect of our existence, it is vital for many aspects, in fact in regard to many of them everything turns on how well the structure of the state performs.

Fighting terrorism? From among the DSPs, will you promote 'X' as SP and put him in charge of operations because he has the expertise to counter the terrorist or because he belongs to sub-caste 'Z' which falls in Group B of the Backward Castes list and the post that is to be filled is number nine on the roster, the number nine which, in accordance with the roster, is reserved for a person from sub-caste 'Z' ?

Look around the world and see the hurricane pace at which new products are coming up, at which new technologies are erupting. For good or ill, in societies like ours the state is an important factor in determining which products will be encouraged, which discouraged, which technologies will be adopted, which not.

Does that not require specialized, up-to-the-minute knowledge? Will you select persons because they were born into this caste or that; or on the basis of their competence in assessing the technologies?

'But do you mean the existing fellows have it?'

Assume they don't.

Isn't the answer to this lacuna that we institute selection procedures and promotion criteria which will ensure that only those who *do* possess the expertise get the posts? Or is the answer that, as the existing ones don't have as much expertise as the tasks require, let us stuff half the posts with persons who by definition do not have the expertise, let us promote persons because they belong to this sub-caste rather than that?

Only for 'super-specialities'?

Nor is the need for expertise and excellence limited to one or two ministries. It is the imperative in every nook and corner of the state structure. Borrowing in international markets, assessing weapons systems for the defence services, assessing the environmental impact of the Tehri Dam, assessing products to determine whether they are carcinogenic, assessing the relative merits of atomic vs thermal vs hydroelectric power plants... These are *routine* functions of ministries today. Which of them does not require expert knowledge?

How is treatment of cancer, or operating on the liver, or replacing kneecaps or hip joints... how is any of these less in need of specialization and expertise than the instances that the Supreme Court had listed for

illustrative purposes? How is the management of the hospital in which such surgeries will be performed less of a speciality? A fortiori, how is the ministry that shall control, or direct, or intervene in the affairs of all the hospitals taken together less in need of excellence and expertise?

In which arena will ‘pushing files’ suffice in this day and age?

And notice too that we are no longer a conglomeration of isolated, self-sufficient ‘village republics’. The structure – of the economy, of the state – is organically interlinked, interdependent. You can’t have substandard functioning in one area – the management of our economic relations with the rest of the world, say – or casteism in one department – the police, say – without the entire structure getting enfeebled and incapacitated to that extent.

Compelling merit to stay away

With half the positions reserved at the time of entry as well as in promotions, those with merit will *stay away from* government as well as from every institution with which it has anything to do. For the meritorious will certainly know that, even if he makes it to the general pool at the point of entry, his career may be stalled, indeed derailed at any point if he does not happen to be from the caste or sub-caste from which alone post number nine on the roster can at the precise conjuncture of time and place when his promotion falls due be filled.

‘But do you mean backward-caste boys and girls just do not have talent and merit?’

Not at all.

The point is not that there is something genetically wrong with anyone. But that *at this time* the group we are talking about – and that group is not ‘boys and girls from the backward castes’, but ‘boys and girls from these castes who have got the jobs because those jobs are reserved’ – the point is that *at this time* they are not *by definition* qualified for the job.

This is evident from the two facts which we have noticed in the foregoing:

- These are the persons who do *not* qualify on merit; those who do, are *not* to be counted against the reserved quota;

- These persons continue to need reservations to advance in their careers; that is the reason why the Mandal Commission insisted that there be reservations not just at the point of entry but in promotions also, and that is why the Constitution has been amended to ensure this. That is why reservations are demanded, and have been secured not just in undergraduate courses but also in postgraduate ones.

So, *at this time* they are not qualified for the job. And that job has to be done *now*.

Breaking the structure

Nor are the mal-effects going to be limited to the fact that the meritorious will be discouraged from even seeking to enter government service, that they will be excluded from half the jobs in it should they be foolish enough to still seek to enter it.

Services and departments are bound to rupture, and have already fractured in many a state along caste lines. And as the scheme will apply to all government services, all governments, the faultlines will extend beyond the individual department or ministry. They will fracture the entire structure.

A police official orders firing... Five are killed... His fate will depend on whether his superior is from his caste or from one that is hostile to his caste, on whether the officer in the home department is from this caste or that...

Fanciful? But that is what things have already come to in a state like Bihar.

There is and equally enervating consequence of such schemes.

A job should be something one has to work to get, something which one has to do one's utmost to retain and advance in. The job should not be, advancement in it must not be anyone's by right.

But the ethos which reservations foment is exactly that the job, the promotion is someone's by right, and that because of his birth, not work.

How can a modern society survive, let alone grow with this as its ethos?

How are they helped?

'I am definitely against reservation in Government services for any Community for the simple reason that the services are not meant for the servants but they are meant for the service of society as a whole...'

A pregnant remark. From Kaka Saheb Kalelkar's letter forwarding the report of the First Backward Classes Commission.

It bears reflection. For so many bleeding-heart liberals, to say nothing of the hypocrites who snatch at anything that might be made to appear a progressive plume, so many of them are misled into supporting ruinous schemes such as the present one merely because they are said to be for the 'Backwards'.

We have already seen that the sections to whom the scheme is being made available are not 'Backward'. They are the dominant, the prosperous sections. But assume for a moment that we are talking only of the genuinely 'Backward', of say the poor.

A steel mill is set up. What is the best way to help them? By ensuring that it is manned by the ones who are the best and truly qualified for executing the tasks it requires, and is thereby run at optimum capacity? Or by decreeing that half of the jobs in it must be packed with persons who are *by definition* not qualified to man them, and thereby having it work at half its capacity? And to be soon pushed into bankruptcy by lower-cost mills of China?

In fact, I will be surprised if a steel mill, or a continuous-process chemicals plant can be made to function at half its capacity with half of its personnel selected on the basis of their birth rather than on the basis of their ability to do the job here and now.

The worldwide clients of Wipro, of Infosys, of TCS; the automobile firms that are turning to India for designing and producing their component – why will they come to India if half the employees in these firms have been selected because of their birth, and not because they are the very best?

'27 ver cent of one per cent'

'Arun, why are you so upset? Central government employment is only one per cent of total employment. Giving 27 per cent of one per cent is not going to bring down the heavens.'

It was one of the best persons we have had in public life, the then finance minister, Mr Madhu Dandavate, as we ran into each other at a Rashtrapati Bhavan reception at the height of the agitations against the decision of the V.P. Singh government to ram Mandal down everyone's throat.

I was deeply saddened.

Not only because he prefaced this with the remark, 'Not all of us can have your courage' – even though I knew of course that he was just mocking me, and not saying anything about himself or his colleagues.

Not only because he of all persons surely knew that the effect of packing half the jobs in the structure of governance was to introduce a new virus – and in a massive dose – that will incapacitate the entire body.

But because the argument actually proved the opposite.

After all, how was 52 per cent of the country's population going to be materially helped by being given 27 per cent of one per cent of jobs?

And that is exactly the argument that has gained currency since then – so that today the political class is on the verge of decreeing reservations in the private sector also.

Society itself

Indeed, the consequences transcend the economy, even the state. They rend society itself. For the scheme gives entire communities, and lethally aggressive communities at that, an interest in perpetuating, nay sharpening their separateness.

Reservations in legislatures on the basis of caste. Seeking votes on the basis of caste. Just these two things and we have seen how they have reinvigorated casteism throughout the length and breadth of our country.

The move marks a societal regression in another way also:

- Individuals are to get advantage because they are members of a group;
- Not just because they are members of *any* group, but because they are members of a caste;
- And the advantage they are going to get is to be better able to grab at the state.

Each of these features has debilitating consequences.

When one secures a gain not because of what he does but because he is a member of a group, he works to strengthen that group.

And, as Mancur Olson has shown in his vital work, *The Rise and Decline of Nations*, such a group is *anti-the whole*. As he shows, it is just *not* rational for members of the group to devote themselves to the interests they have in common with the rest of society. If they did so they would have to take on the whole or a disproportionate share of the cost of realizing those interests while securing only a small part of the benefits. The interests that are most profitable for the group to pursue are those which are exclusive to its members. (The calculus holds true for the atomic individual a fortiori. But he cannot as an individual impede the structure the way the group not just can, but ever so often does.) When such groups multiply and acquire power, society is immobilized. It is locked in countervailing rigidities.⁴ Britain of the 1950s, '60s and '70s. France more recently. The effect of many of our trade unions in our industry in the 1980s, of caste and religious groups on our polity today.

And this at the precise moment when innovation, adaptability, nimbleness are what our society, our economy, our state need.

Indeed, the interests in this case are not just exclusive to the members of the group, they are explicitly *at the expense* of the rest in society, for the jobs the members of the group get are jobs that others are excluded from.

And this at the precise time when harmony, a coming closer, is what our country so desperately needs.

Worse, the group which the citizen is propelled by the policy to fortify is not just *any* group. It is his caste qua caste.

The very thing everyone, the progressives most of all, has been screaming is the curse of our society.

And then there is the nature of what he is being given. What he is being given for being a member of the group, the caste, is not, say, a once-over cash prize. He is being given an office of state. That intensifies the notion that the state, that everything in it, that everything that flows from it, that everything that can be *made to* flow from it is one's to grab. Has this notion of the state not already contorted the structure to dysfunctionality?

And now the notion is to be spread beyond the state structure...

The other way

For thirty years, each concession, each relaxation of standards, the inclusion of each new caste in the reservations list has been decreed with just one thing in mind – the vote banks to whom ‘the right signal’ needs to be sent. The progressive judge can’t be bothered, indeed he sees merit in this pandering to the newly risen. ‘Sometimes it is obliquely suggested,’ we are instructed in *Vasanth Kumar*, ‘that excessive reservation is indulged in as a mere vote catching device. Perhaps so, perhaps not. One can only say “out of evil cometh good” and quicker the redemption of the oppressed classes, so much the better for the nation...’¹

And that is of a piece. Our political class just throws a concession at some group, it just throws funds at some problem or region, and proclaims itself to be the champion of the poor and neglected. In states such as Jammu and Kashmir, in the Northeast, Delhi has deluded itself into believing that it has ‘done its duty’ by pouring money into them. The money has ended up financing insurgents. But if you point that out, you are accused, ‘He is anti-Kashmiri, he is anti-the people of the Northeast.’ In regard to the Public Distribution System, the political class has made itself believe that it has done its duty by the poor because it has dispatched grain to the ration shop – even as the Planning Commission publishes reports that 30 to 100 per cent of the grain and sugar end up in the open market.² Nor is that confined to the Public Distribution System. In the same *Midterm Appraisal*, the Planning Commission pointed out that the overall amount being spent on the principal poverty alleviation programmes excluding the amounts spent on many other sectors such as infrastructure and social welfare at the time was around Rs 40,000 crore a year; that the total number of poor families in

the country being approximately five crore, the amount that was being spent per poor family was roughly Rs 8,000 per annum. The Commission added, 'Even assuming that each one of the 5 crore families were completely penniless and had no other source of income, they could buy every day 3 kg. of foodgrain with this money from the market at the rate of Rs 7 per kg. and thus come above the poverty level.'³

But the moment you question these schemes, the moment you even quote official reports that state that the Public Distribution System is the least cost-effective way of attacking poverty, you are denounced as being anti-poor.

The story is exactly the same in the case of reservations. Reservations should not be allowed to become a vested interest, the Supreme Court stated in *A. Pariakaruppan*. The efficacy of the reservations policy will consist in how soon reservations can be done away with, it stated in *Soshit Karamchari Sangh*. 'The policy of reservations in employment, education and legislative institutions should be reviewed every five years or so,' the then Chief Justice, Y.V. Chandrachud, counselled in *Vasanth Kumar*. But today if you so much as inquire, when reservations may end, you are bound to be traduced as anti-Dalit, and worse.

Are only a few sub-castes hogging the seats reserved for Scheduled Castes and Tribes? Are castes being added to the list of Backward Classes because they are deprived or because they are so powerful that politicians today just have to pander to them? If today, thirty-five years after the Supreme Court directed the executive to always keep a watch on who is wresting the advantages from reservations, you ask, 'What percentage of the seats in the general pool are going to castes for which there are reservations?,' there is no answer. On the contrary, there is the charge: 'This is all a conspiracy to cast doubt on the whole policy of reservations and thereby snatch the meagre benefits that have been secured by the backwards after untold sufferings and endless struggles.'

This descent, or, if you prefer, this progression to lower and lower standards, to the poorer and poorer functioning of the state and, therefore, to its increasing inability to discharge its duties vis-à-vis the poor as much as towards anyone else, the debasement of public discourse and, therefore, the

progressive inability to arrest the descent is as inevitable as it is predictable. The consequences are before us in

- The type of person who is now making it to our legislatures;
- The collapse of norms and standards in our educational institutions and our civil services;
- The splintering not just of the electorate, not just of legislatures but of the services along caste lines;
- A generalized assault on excellence.

Ortega Gasset comes true: standards are dismissed as elitist; mediocrity has become the norm; vulgarity is authenticity; intimidation is argument; assault is proof...

This way, as Panditji pointed out decades ago, lies not just folly but disaster.

What should be

The way to climb out of the abyss is manifest.

No status, no job, no post, no position, no concession should be accorded to anyone by virtue of her or his birth, caste, creed, religion or race.

Indeed, none of these should be given to anyone as an entitlement, as a matter of right. Each of these must be something for which we have to strive.

That holds true of governmental posts most of all. True, the sovereign remedy today is to continue to reduce the role of the state in our lives. That has been the running theme of reforms since 1991, and we can glimpse the efficacy of this remedy in the way economic progress has accelerated during the last fifteen years. But there are minimal functions that only the state can perform. These require competence and sustained application – as much as work in any other sphere requires them. And the work that falls to the state today has to be done *today*, it has to be done *here and now*. That someone has the potential to eventually learn to execute that work is no substitute for, if he is given that job today as an entitlement, as a matter of right, and he does not have the competence to do it well *today*, that vital job will remain undone or will be ill-done, and the country will suffer. It will

suffer not just directly – by the fact that that particular job will be ill-done. It will suffer even more, indirectly – the state will get delegitimized, the virus of mediocrity will take root.

So, no status, no job, no post, no position, no concession should be accorded to anyone by virtue of her or his birth, none as a matter of right. Our scriptures contain enough admonitions to the effect that a person is to be known by her or his conduct, not by their birth. In his scholarly works, Arvind Sharma has shown in addition that there was great mobility and elasticity in the caste system even in ancient time – there were kings from all castes; there were savants and teachers from all castes; there were Brahmin armies, Kshatriya armies, Shudra armie – Chanakya valued Shudra armies all the more; the Brahmins are too easily propitiated, he observed.⁴

In any event, any passage in any scripture that fixes status or occupation by birth, must be jettisoned. An assertion that differentiates persons by birth, colour, race flies in the face of the doctrine central to our religion – that is, the proposition that each being has a soul and that this is identical in all.

The caste system can be reinterpreted in this sense – Gandhiji's numerous writings on caste testify that doing so would in fact not be 'reinterpretation'; it would be to restore the caste system to its original meaning: a system purged of notions of superiority and inferiority, an inclusive system, a system imbuing people with a sense of duties towards each other rather than one prescribing taboos and superstitions.

And it is also the case, as Mark Tully points out in *No Fullstops in India*, that even today the caste system provides millions of individuals with a sense of identity and security. It is true that many castes have a tradition, one that is visible to this day, of providing assistance to members of the caste, and that this tradition of solidarity has been an important spur to advancement of members of these castes. Professor R. Vaidyanathan of the Indian Institute of Management, Bangalore, points to this tradition of mutual assistance as being one of the secrets behind, for instance, the phenomenal success of Gounders in Tirupur in the garments industry, of Nadars in Virudhunagar area in the match-making and printing industries. He points to the way members of these communities as also the Marwaris,

Sindhis, Kutchis, Patels help each other – their willingness to extend credit, the strong networks of the communities, their contract enforcement mechanisms, the way their members encourage and assist each other to take on risks and how they stand by each other in case of failure. Vaidyanathan concludes from such instances that in India ‘caste is vital social capital,’ and that a key way out of the problem is to help SCs/STs, OBCs become ‘Vaishyas’ – that is, to help them become entrepreneurs by extending bank credit and other facilities that they need for setting themselves up in business.⁵

So, the system has its uses. So, it is possible to reinterpret it in modern terms. But by now the caste system has got so overlaid by history, by now several practices associated with it or advanced in its name have become so harmful as well as so mulish that it is better to jettison it altogether.

And the fact is that it *was* and *is* being erased by modernization. Just twenty to thirty years ago, observers were writing about the elaborate rules which governed the hands from which a high-caste person may accept food or water: does anyone go about finding who is working in the municipal waterworks, who is cooking the food that is served in the stall from which he eats? Thirty to forty years ago, the observers set out, with some glee, the number of times a Brahmin in the south had to bathe if so much as the shadow of a Harijan fell on him. Does anyone – Brahmin or not – ascertain the caste of the man pressing against him in our jam-packed buses and trains? To which category in that fourfold division with which these observers traduced us and our culture do the modern professions correspond – journalism, engineering, IT, environmental remediation, medicine?

So, caste was and is indeed being erased by modernization. It has been given a new, diabolic lease of life by two general factor – electoral politics and state policies – and, within these, by three specific ones. As politicians have been less and less able to commend their case on the basis of their performance, they have pandered to sectional, specifically caste groups; second, many have concluded that the one sure way to channel governmental outlays and other patronage towards themselves is for them to organize themselves by some sectional identity; third, reservations.

Those who are disadvantaged must be lifted, of course. But the help must be of a particular kind: it must consist of positive measures which

raise their standards and equip them to out-compete the rest. It must not take the form of a lowering of standards nor of blocking posts and positions.

To identify those who are to be helped, the individual must be the unit of state policy, not a group.

To identify the individual, her or his income or assets, educational deprivation – that is, purely secular criteria – must be the yardsticks, not caste or religion or race, etc. Why is it that the ‘economic criterion’ is accepted when it comes to determining access to the Public Distribution System, but the moment it is proposed for reservations, the shout goes up, ‘A conspiracy to divide the backwards’?

There is the conclusive reason that we have already encountered in the case of separate electorates for sticking to secular criteria: politics congeals around whatever criterion is selected for state policy and programmes, interests get vested around it, ultimately power. And there are additional reason – in law, and in fact. As happened in so many matters, that simple and good judge, Justice H.R. Khanna, voiced in words true and straight the caution we must bear in mind. While some of his colleagues on the bench handling *N.M. Thomas* were sweeping themselves off their feet by their own prose, he wrote with his customary diffidence:

I may state that there is no dispute so far as the question is concerned about the need to make every effort to ameliorate the lot of the backward classes, including the members of the Scheduled Castes and the Scheduled Tribes. We are all agreed on that. The backwardness of those sections of the population is a stigma on our social set-up and has got to be erased as visualized in Article 46 of the Constitution. It may also call for concrete acts to atone for the past neglect and exploitation of those classes with a view to bring them on a footing of equality, real and effective, with the advanced sections of the population. The question with which we are concerned, however, is whether the method which has been adopted is constitutionally permissible under clause (1) of Article 16... The answer to the above question, in my opinion has to be in the negative... We have also to guard against allowing our supposed zeal to safeguard the interests of the members of Scheduled Castes and Scheduled Tribes to so sway our mind and warp our judgment that we drain off the substance of the contents of clause (1) of Article 16 and whittle down the principle of equality of opportunity in the matter of public employment enshrined in that clause in such a way as to make it a mere pious wish and teasing illusion. The ideals of supremacy of merit, the efficiency of services and the absence of discrimination in the sphere of public employment would be the obvious casualties if we once countenance inroads to be made into that valued principle beyond those warranted by clause (4) of Article 16.⁶

Justice A.C. Gupta concurred, and recalled the warning that Justice Gajendragadkar had voiced in the context of Article 15(4) – namely, that in justifying steps in pursuit of one ideal we should beware lest we trample upon other ideals enshrined in the Constitution. In *M.R. Balaji*, Justice Gajendragadkar had observed:

When Article 16(4) refers to the special provision for the advancement of certain classes or Scheduled Castes or Scheduled Tribes, it must not be ignored that the provision which is authorized to be made is a special provision; it is not a provision which is exclusive in character, so that in looking after the advancement of those classes, the State would be justified in ignoring altogether the advancement of the rest of society. It is because the interests of the society at large would be served by promoting the advancement of the weaker elements in the society that Article 15(4) authorizes special provision to be made. But if a provision which is in the nature of an exception completely excludes the rest of the society, that clearly is outside the scope of Article 15(4). It would be extremely unreasonable to assume that in enacting Article 15(4) the Parliament intended to provide that where the advancement of the backward classes or the Scheduled Castes and Tribes was concerned, the fundamental rights of the citizens constituting the rest of the society were to be completely and absolutely ignored.⁷

Precisely, and yet an understatement. The Constitution has asked that ‘special measures’ be taken for the upliftment of the weaker sections of our society. But the ‘special measures’ have been reduced to ‘reservations’. That word is waved to fool the poor. Whether it is the best way to help the poor; whether the benefits from it are reaching the truly poor – none of this is examined.

Justice Gupta also recalled what the Supreme Court had said in *State of Jammu and Kashmir v. T.N. Khosa*:

...Let us not evolve, through imperceptible extensions, a theory of classification which may subvert, perhaps submerge, the precious guarantee of equality. The eminent spirit of an ideal society is equality and so we must not be left to ask in wonderment: what, after all, is the operational residue of equality and equal opportunity?

‘I believe,’ Justice Gupta concluded, ‘these words are not just so much rhetoric, but [are] meant to be taken seriously.’⁸

In a word, all our countrymen must be lifted out of privation. Inequalities that arise from birth must be minimized. But the history even of the last hundred years shows that there shall always be inequalities in every

human group. Indeed, it shows that the regimes, movements and individuals who have shouted the loudest against inequalities, who have most stridently proclaimed their resolve to institute equality, are precisely the ones who have established, and brutally perpetuated regimes which fomented the most brazen and vicious forms of inequalities. And it is the rhetoric advocating equality that was made the justification for snuffing out other value – liberty and elementary freedoms being among them. In our case, as Justice Khanna's observation portends, that contrived passion will erode other ideals and goals enshrined in the Constitution.

Privation must be erased. Inequalities based on birth must be minimized. This is best done, as the framers of our Constitution envisaged, by outlawing, on the one hand, discrimination and ostracism, and by providing, on the other, positive help which will equip the disadvantaged to outdo others.

The amelioration will necessarily be a gradual process. Hastening it will disable the state from discharging its minimal functions. And it will inevitably end up merely replacing one set of privileges by another.

To individuals who have been identified as disadvantaged by economic criteria, the fullest help that the state can afford must be given so that their standards may be raised – free and extra tuition, subsidized and extra nourishment, residential accommodation, whatever is needed. But at the starting point for any job or post, ability to perform the work that has to be done, to accomplish it here and now must be the singular criterion.

After entry, and throughout the career, performance and whether the person has the abilities which that level or the next level requires alone should govern continuance and advancement.

At the point of entry as well as at every subsequent post of advancement, the standards must be those which the proper discharge of duties at that level requires.

These should most certainly be appropriate to the job, they should test the person in the abilities that are needed for the job; if necessary, the methods of assessment should be continually honed so that more and more appropriate persons are selected.

But at no time and at no level should the standards in force be 'relaxed'.

Whatever the standards which have been retained as the best available at that moment, must be applied, they must be applied equally to all, and

strictly to all.

And whenever any assistance is given – in this field or any other – the state, and, even more so, informed sections outside the state apparatus must keep a close watch over the measure – over the extent of benefits they are yielding, over who is benefiting from them – and publish the results.

Prerequisites

For any of this to come about, three things are necessary.

First, as our review shows, judges must reflect on the encouragement they have given to the worst instincts of the political class:

- They must reflect whether they have not been swayed by intellectual fashions of the day.
- They must look beyond the case at hand, and envision the meta-consequences of their decision, and, as the examples we have encountered show, they must reflect on the meta-consequences of their grandiloquent prose.
- They must revisit the premises that have propelled many a judgment, and reassess whether, given the direction in which the political class is hurtling today, they will best serve the country by being instruments of some imagined revolution or by *conserving*.
- All that the revolutionary proclamations of those progressive judges who fancied they were working a revolution accomplished was to provide a rationalization for what were manifest departures from the scheme and spirit of the Constitution. These in turn provided rationalizations for the worst instincts of the political class. Even in the 1960s, what were needed were pronouncements that would make the political class pause and reflect, not fanciful phrases that would cheer it on. This role of restraining is infinitely more necessary today – when the political class is so set in the wrong direction; when it is so splintered that any little posse can push it farther in that direction; when it has become so cynical that, even as its highest representatives state in private that the measure before them will harm the country, they don't just vote for it, they make sure that all concerned notice that

they are voting for it. In a word, to *conserve* has always been the proper role for the judiciary. It is an imperative today.

- The liberals among them must review the premise that has so often governed their judgments: that temporizing will assuage the political class; that by going halfway, they will persuade the political class as well as the revolutionaries on their own benches to desist from going farther. As the five-year stay that was accorded in *Indra Sawhney* shows, as the legal opinion that was given in regard to dilution of standards shows, the political class will use every aperture, every qualifying phrase to overturn the entire scheme that was envisaged, and push its convenience of the moment.

Second, those who see the abyss into which the political class has pushed the country, and who aim to do something about it, must learn from the casteists. They are, not just aggressive, they are, within legislatures as much as outside, in services as much as outside, well organized. They act as a block, indeed as a fist. And, therefore, every political party has to bend to them. On the other hand, in state after state, I find the same pattern. Ever so many are alarmed at the direction in which the political class is hurtling the country. They are alarmed at the extent to which society has already got divided along caste fissures. But the only opposition that is being put up is by an individual here, an individual there.

Hence, those who are making the new India – by their innovations, by their hard work, by their striving for excellence – must speak up. They must *organize*.

Third, and most important, as we have seen, the principal reason for the descent is the alarming deterioration in the quality of persons in public life. In turn, that deterioration has been caused by many factors.

Structure is one of them. It is true, of course, that there is no structure that cannot be perverted. Equally, almost every structure can be put to do good. But structures and conduct react on each other. The smaller the constituency, for instance, the easier it is for someone who sets himself up as the leader of a caste to prevail, and, therefore, the greater is the incentive for him to inflame and frighten that narrow group. Conversely, if all of India were one constituency – for instance, if the head of the executive were

to be directly elected – there is no caste by inflaming which anyone could succeed.

One important cure, therefore, is to think through alternatives to the present structure.

The pre-prerequisite

But to even commence that search, there is a prerequisite. Discourse must be liberated from cowardice. We must restore depth to it. So long as intellectuals, the media, to say nothing of the political class, remain afraid of being dubbed ‘anti-poor’ or whatever, when everything is reduced to the fleeting ‘sound-byte’, we will not be able to even begin the climb out of the present abyss.

Today, if you do no more than use the word that Gandhiji used, ‘Harijan’, and not the one that has been coined as a weapon in the politics of grievance-mongering, and to justify norm-less conduct – ‘*Dalits*’ – you are a *Manuvadi*, and, therefore, by definition an oppressor who is in secret conspiracy to make millions untouchables again.

If you point to the truth about reservations: that they are a sleight of hand of the politician – instead of working to ensure better education, better hostel facilities, superior tuition for the disadvantaged, he gets posts ‘reserved’, and proclaims that he has brought boons for them; that these are ‘boons’ in the most stagnant part of our society, namely, government service; that they have led to a perverse race, a jostling to get one’s group declared ‘backward’; that in several states, the reservations are being cornered by a few sub-castes; that the proportions of jobs that are now being reserved far exceed even the illustrative proportions that had been stated in the Constituent Assembly by Dr Ambedkar himself – if you request even that these apprehensions be *examined*, you are part of the oppressor regime, you are a Manuvadi, and are scheming to divide the oppressed to boot.

Initially, all sorts of aggression was justified in the name of ‘class’. While it successfully silenced the rich, while it got the literati to start parroting the same verbiage, communists and socialists soon found that ‘class’ rhetoric was not enlarging their base. The way forward was out-and-out caste politics. But how were these progressives to adopt such a

retrograde category into their platform? Hence, the breakthrough formulation: 'In India, caste is class!' And, as we have seen, that convenient superimposition was picked up by the progressives in the judiciary itself.

Since then 'social justice' has been the great rationalization of every step to pander to sections, in particular to castes and 'minorities'.

Bosses who control such groups are, *ex officio*, exempt from all norms. Their vulgarity is authenticity. Their ignorance of affairs of state is precisely what makes them *like the people*. Whosoever talks of exactions by them and their relatives, does so only because they are from the lower castes, and he can't stand their being heads of government! Today no officer, even if he has conclusive proof of wrongdoing by an officer who got in through the reservation route, dare say so even in the annual confidential report lest he himself be charged with 'hostile attitude towards SCs/STs'.

As has been stressed repeatedly, there cannot be any doubt at all that those who are disadvantaged must be helped. But today all that is being done is to pander to groups to buy votes, and to dress this pandering up as 'social justice'. That moment when, frightened of a rally, a politician – one whom his closest associates did not remember having so much as talked of the matter earlier – lunged for Mandal is the true symbol of the times. As is the avalanche which is sent hurling down on even the minutest effort to deport illegal Bangladeshi infiltrators.

'Social justice' has thus resulted in a moral and mental paralysis. Labour laws? Dare not touch them as you would be injuring poor worker – even though organized labour is the aristocracy of the Indian working class: specially so the workers in public sector units, their pay and allowances being higher than those of workers in private units! The Rs 45,000 crore that are currently spent on subsidies every year? Dare not question them as you would be kicking the stomachs of the poor. Free power? Dare not say anything against it as you would then be against the poor farmer – even though the poor farmer is not the one who gets such power as reaches the village, even though farmers are willing to pay for power if only they get reliable power. Minimum support prices? You dare not question them as you would then be anti-farmer – even though these prices are benefiting farmers in just four states, even though, even in these states, they are keeping the farmers from diversifying into higher-value crops. PSU corpses kept on artificial respiration? Dare not say anything about them – for then

you are against hard-working labourers who, with their blood, sweat and tears have built the ‘temples of modern India’ – never mind how the country, and therefore the workers themselves, would be so much better off if the resources that are locked up in these units were put to more productive use. Sugar subsidies? Dare not touch them – even though they perpetuate the growing of this water-intensive crop in drought-prone areas of Maharashtra, even though the subsidy benefits the mills and keeps them inefficient to boot, rather than the cane growers. Fertilizer subsidies? Dare not reduce them – even though times without number it has been shown that they are being cornered by mills and not being passed on to farmers, even though by subsidizing chemical fertilizers we are encouraging farming practices that harm our soil, that poison our food. Subsidies on kerosene? Dare not ask about them; if you do, you are robbing the poor of the fuel they use for cooking – even though everyone knows that the subsidized kerosene is being used to adulterate diesel! Locating industries in uneconomic sites? Dare not question the policy for then you would be against the development of backward regions of the country – even though the concessions are repeatedly exploited by unscrupulous elements to escape taxes, even though in the long run the units are not able to compete because the location remains inappropriate...

It is not the general interest that has occasioned these programmes and concessions. Nor the need of the particularly disadvantaged. *Jiska daav lag gaya, usne kheench liya*. And the agglomeration of these concessions is the ‘human face’ of our policies. I have little doubt that if the total amounts that have been squandered, and are being squandered on such programmes had been used productively, the country would have grown so much faster and the poor themselves would have been far, far better off.

The economic consequences of such pandering are very important in themselves. The other consequences are far more injurious.

When a polity once accepts that this is the way to ‘look after the interests of the poor’ – that is, by diluting standards, by making special concessions regarding outcomes to a group – it just has to go on extending, as we have seen, the ambit of dilutions and concessions. And no segment of the polity, no political party for instance, can resist the pressure to go on a hunt of its own for groups for which *it* will wrest concessions. It will issue whips to make sure that its legislators make enough of a show of support to

convey ‘the right signal’ – the signal that this party is as committed to that target group as any rival.

But even short of whips, the pressures that such blind worship of a chimera like ‘social justice’ engenders, silence the one who might venture to state the truth. In April 1992, while responding to a discussion in the state Assembly, the then chief minister of Assam, Hiteshwar Saikia, admitted that there were thirty lakh illegal Bangladeshi immigrants in the state. Unless he withdraws that statement within forty-eight hours, thundered the head of the Muslim United Front, his government will be brought down. Saikia immediately declared that he had never made the statement – though he had made it on the floor of the Assembly itself. In 2004, the then chief minister of Kerala, A.K. Antony, one of the most upright of recent chief ministers, warned that minorities were exacting too much in the form of benefits, that their organizing themselves into vote banks was bound to create a backlash. He was traduced no end. And eventually, that statement cost him the chief ministership. In 2005 a telltale sequence was enacted again in Kerala. All of us remember what a great reformer Sri Narayana Guru was, and what a sea-change he brought to the lives of millions, in particular to the lives of the then untouchable Ezhavas. The SNDP is the Ezhava organization today. On 2 January 2005, at one of the most significant gatherings in the state, the congregation of the Nair Service Society, the general secretary of SNDP, Vellappally Natesan, said that the minorities were capturing all the benefits in the country in the name of secularism, that they were swallowing the majority, that a situation has arrived in Kerala when members of the majority can escape from this only by converting themselves or committing suicide. He blamed politicians for making the situation worse by hankering after vote banks. He asked the majority to come together. He narrated how, precisely because the SNDP and the Nair Service Society were striving to bring their followers together, they were being attacked day in and day out...⁹ The account of this speech appeared in the papers on the morning of 3 January. The afternoon was not over and an avalanche of denunciations was sent down on Vellappally. He cares only for the rich in his community... He is fomenting communal hatred... He has no shame in making himself available to the RSS...

Where is the freedom of speech in such an atmosphere? How can rational examination survive such verbal terrorism? But those who hurl the denunciations do so to a well-honed strategy, to a clear aim: make an example of the person who speaks that fragment of fact and thereby frighten everyone else so that the claims of that particular group – ‘low caste’, ‘minority’, ‘labour’ – are put beyond examination, in the verbal equivalent of the Ninth Schedule, so to say.

There is another consequence too – one that will tell on both the effectiveness of the state as well as on freedom within it.

What the *outcome* of what I do will be, depends not only on the opportunities I have, not only on my effort, but also on circumstance – for instance, the effort put in by others on that matter that day; much as whether an item will make it to the front page of the newspaper tomorrow depends in part on what else has happened that day. And the outcome depends on chance.

Today, as we have seen in the rulings of progressive judges, ‘social justice’ is taken to mean that the state must guarantee equality of *outcomes* to all, indeed in many instances that it guarantee particular outcomes to members of particular groups independently of whether or not they make the effort that is mandated for that outcome -witness the way qualifying marks are lowered, sometimes to near nothing, for candidates from particular castes.

As one group after another is able to get on to the schedule or wrest the label ‘backward’, the spheres in which the state must intervene become larger and larger: witness the imminent prospect of reservations being extended to private enterprises. You would have noticed a curiosity: the very persons who habitually denounce the state as it seeks powers to maintain law and order, to fight terrorism, say, are the ones who demand that it discharge more and more functions to ‘abolish poverty’, to deliver ‘social justice’!

These demands are being heaped on the state at a time when it is able to deliver less and less. Indeed, almost the only thing that is putting a limit to the concessions that political parties are ready to make to sectional demands is that the resources at the command of the state are limited.

The consequences are certain. Tugged and pushed, the state will lurch from one concession to another. As there are many groups that can claim

that they deserve ‘social justice’, and as their claims often conflict with each other, the state will often be paralysed – witness what has happened to administration and development projects in UP as a result of the conflict that has been stirred between Mayawati’s ‘Dalits’ and Mulayam Singh’s ‘backwards’. The leader of each group foments a zero-sum mentality, cheered, as we have seen, by many a judge, to say nothing of commentators. That mentality congeals into conviction as, aided by the paralysis that the rival claims to ‘social justice’ have caused, the sum indeed does not grow as rapidly as it might – witness the stagnation in so much of north India.

Two apparently contradictory things happen simultaneously: on the one side, as it fails to live up to promises, the state loses legitimacy; and, on the other, capturing the state becomes all-important. *All* means are, therefore, unleashed to capture the state – witness what is being used to win elections these days. And that contributes to intensifying the ills: the diversion away from growth; suborning of institutions; the flouting of rules and norms; thus the continuing de-legitimization of the state... As the state loses legitimacy, rules and laws are flouted with even greater abandon, institutions like the police and civil service are suborned even more brazenly.

All this while, there is the myth of democracy – that what is being done is ‘the will of the people’, that the rulers have ‘the mandate’ to do what they are doing. High on ‘social justice’, there are legions of legitimizers – servants ever so civil to whoever happens to be in office; legislators; lawyers and judges; alas, many a journalist too.

We talk of ‘Freedom under the law’, we repeat ‘Government of laws, not men’. But what is law in such a circumstance? What protection can it afford against a demagogue who has donned the cloak of ‘a man of the masses’, who has bamboozled enough people for the moment that he is the messiah delivering ‘social justice’? What is the Constitution when it can be altered time and again by the majority of the moment?

Alas, as we have seen, even courts are not immune from such rhetoric. Injustices are exaggerated to legitimize what the politician has, for other reasons, found convenient. The advances that have been made, that *are daily being made* – the way modernization has been eroding caste, to cite the example we have encountered in detail – are resolutely ignored. Worse, norms that are absolutely essential for us to hold our own in the fiercely

competitive world of today are thrown out of the window – and that too on the say-so of an opportunist of a politician.

Therefore,

- We should be alert to the way catch expression – ‘the poor’, ‘the backwards’, ‘social justice’ – are being used to undermine standards, to flout norms, to put institutions to work – not for the millions in those categories but for the ones who have fooled those millions with those catch phrases.
- Subject every claim – whether it is made in the name of ‘the poor’, ‘the backward’, whosoever – to rational examination.
- After it has been in effect for a while, subject every concession to empirical evidence.
- Shift back from the figment, equality of outcomes, to equality of opportunities.
- And in striving towards that, compel politicians to move away from the easy option – of just decreeing some reservations, etc. – to doing the detailed and continuous work that positive help requires, the assistance that the disadvantaged need for availing equal opportunities.
- Be alert to the way never-never goals like ‘social justice’ over-extend and eventually undermine the state. Shift the debate from ‘a large state vs a small state’ to a state that performs.
- Bear in mind that if the majority disregards smaller sections in the community, it drives them to rebellion. Equally, if their leaders stoke the smaller sections into aggressive behaviour, if they wrest concession after concession, if they are welded into blocs for votes, etc., there *will be* a backlash from the majority.

Refashion policies of the state on truly secular and liberal principles:

- The individual, and not the group should be the unit of state policy.
- Never concede to one group – for instance, one religion – what you will deny to another group – for instance, another religion.
- Never concede to a caste or religious group what you will deny to a secular group.

I remember saying all this at the time Bhindranwale was being patronized. I was denounced as a communalist. What transpired exceeded my apprehension.

I remember saying the same thing when concessions were being extracted, and given in the name of secularism at the time of the Shah Bano case. I was denounced as a communalist. The backlash exceeded my apprehension.

I sense the same cycle of pandering begin again. The denouement will be no different. There will be little point in moaning about the outcome then.

Depth, and courage

Intellect has been driven out of discourse in India.

By intimidation, as we have seen.

By superficiality – debate seldom goes beyond the slogan.

By superciliousness – in the month that Manipur was on fire, the two great questions that gripped Delhi's two largest papers were why liquor vendors should not remain open till midnight, and why citizens of Delhi should not have the convenience of shopping round the clock.

By 'balanced journalism' – 'Murli Manohar Joshi says... Arjun Singh says...' So that, if tomorrow 25 June were to occur again, *The Times of India* would have, as it does on other issues, two editorials -one pro, one con. Though I confess that would be a vast improvement over what it had printed about *that* 25 June: led as it was by very progressive intellectuals then, it endorsed the Emergency out and out!

Sad to say, even the judgments of our courts do not give evidence of the deep reflection that we need. They betray little of that reference back to first principles that we need – specially at a time when those principles are being prostituted by the 'commentariat' as much as by the political class.

All this leaves us dangerously exposed.

Freedom and growth and justice have many prerequisites, but none more fundamental than free speech – for by that alone can the usurpers' assertions be punctured, by that alone can ruinous policies be rolled back. But for speech to be valued enough by the people so that they would not permit the usurper to stamp it out, so that wrong policies may not survive as

long as the licence-quota-control raj did, speech must be reasoned, it must inform through cogent argument, it must deliver evidence.

Restoring substance to public discourse, thus, is the pre-prerequisite we need.

And the pre-pre-prerequisite for that is the courage – ordinary courage – to stand in the face of intellectual fashions. And a little obstinacy – that we will shun superciliousness, that we will examine each issue in depth. After all, the future of our country depends on the outcome.

It may be that once a poison like casteism enters the body one just has to wait for it to work its way out of the entire body – that we will just have to wait till a modernizing, increasingly intertwined economy will be so stymied by an inefficient state apparatus and evils like casteism that it will bring sufficient pressure to bear for reform. That may imply that remedying the basic ills that we have encountered above may be beyond our reach. But even if that were indeed the case, there is much we can do to ‘give history a helping hand’. The fulcrum of reform, that is discourse, is within the grasp of each of us. We can explore alternate constitutional arrangements, alternate ways of helping the disadvantaged. We can Inject those alternatives into public discourse. We can puncture the falsehoods by which standards are being diluted, institutions suborned. Each of us can take up one institution and work to make it run better, to make it more accountable. Each of us can take up one issue, one policy and improve discourse on it.

What the *Dhammapada* counsels for each of us holds equally good for each institution, each matter of state, each facet of society that we want to reform:

*As the silversmith removes impurities from silver,
So the wise man from himself.
One by one, little by little, again and again.*

Epilogue or
suicide by a thousand cuts

Three slaps

13 May 2004: The Congress government with Y.S. Reddy as chief minister is sworn in as the new Government of Andhra Pradesh.¹

2 June 2004: The chief secretary holds a meeting. Secretaries of various departments attend. The chief secretary announces that the government has decided to provide reservations for Muslims.

4 June 2004: So as to include them in the list of Other Backward Classes and thereby give them reservations in educational institutions and public employment under Articles 15(4) and 16(4), the Andhra government issues an order directing a department of its own, the Commissionerate of Minority Welfare to submit a report recording the social, economic and educational backwardness of Muslims.

5 July 2004: The Commissionerate duly submits the report that the government has asked for. And it duly recommends that Muslims be given 5 per cent reservations in both educational institutions and public employment.

7 July 2004: The government issues an order: 5 per cent reservations are granted to the Muslim community.²

The government's order is challenged in the Andhra Pradesh High Court. The challenge is heard by a bench of five judges. The court strikes down the government order as wholly unconstitutional. The court comes to this conclusion on several grounds.

Before a group can be accorded reservations in educational institutions under Article 15, it has to be established that the group is 'socially and educationally backward'. And before the group can be granted reservations in public employment under Article 16(4), the authorities have to establish both – that the group is 'backward' and that it is inadequately represented in governmental employment. The government has decreed reservations for

the entire Muslim community, but the Muslims are not a homogeneous group: there are caste-like stratifications among them, the high court noted, observing:

Non-Hindu religions like Islam, Christianity, and Sikh, do not recognize caste as such, but the existence of caste-like social stratification among the Muslims is well recognized that in spite of egalitarian philosophy of Islam, which opposes all kinds of discriminations, almost all types of caste groups have emerged in the Muslims. The Muslims have developed different caste-groups at different places, but they call themselves as *Jamat* or *Biradari* and do not use the term *Jat* or caste e.g. *Nadaf* 'or *Mansoori Jamat* or *Biradari*, but in actual practice, they possess practically all the traits of caste structure such as endogamy, stratification, occupational monopoly, dress-code and their own different Mosques.³

Therefore, there can be a case for identifying specific groups from among the Muslims as being backward and thereby according reservations for them, the high court said. But what has the government and its Commissionerate of Minosity Welfare done? This is how the high court sets out what it finds:

The process of identification of Muslims as a group as socially backward by the Commissionerate of Minorities Welfare is *totally vitiated since it did not determine any specific criteria for the purposes of identifying the Backward Classes* and applied the same in order to find out as to whether the Muslims qualify to categorise them as socially backward and as well as backward for the purposes of Articles 15(4) and 16(4). The Commissionerate *acted in undue haste*. The Commissionerate *failed to undertake any serious investigation and enquiry* as is required before identifying the Muslim Community as a socially Backward Class. In the absence of laying down the criteria for ascertaining the backwardness, *the entire report is to be treated as an exercise in futility. The approach adopted by the authority is improper and invalid*. In the absence of any such finding as to the social backwardness, the Muslims cannot be classified as Backward Classes either for the purposes of Article 15(4) or Article 16(4) of the Constitution of India.⁴

When, in the face of differentia within a religious community, the required investigation is not undertaken, and the entire community is proclaimed to be backward and reservations are decreed for that religious community, two fatal consequences follow:

- Unequal – the socially, educationally and economically advanced sections among Muslims, and those among them who are backward – get treated as equals. And equal – say, the advanced sections among

non-Muslims and those among Muslim – get treated unequally: the advanced among non-Muslims do not get reservations and those among Muslims do. This strikes at the very root of the fundamental principle enshrined in Articles 14, 15(1) and 16(1), the principle of equality which, the Supreme Court has held times without number, is an essential ingredient of the Basic Structure of the Constitution.

- As no effort has been made to take account of differentiations within the Muslim community and as reservations have been made available to the entire community as such, the decision -of giving reservations to an entire religious community when in fact there is inequality between groups of adherent – is clearly based on religion *per se*, and this is expressly prohibited by the Constitution under Articles 15(1) and 16(2).⁵

To reserve positions for the better off in a religious group, the ‘creamy layer’, as the Supreme Court had characterized them in *Indra Sawhney*, has the same effect that doing so has in the case of a caste, and, in the light of judgments of the Supreme Court, is ‘*totally illegal*’, the high court observed. ‘*Such an illegality offending the root of the Constitution cannot be allowed to be perpetuated even by constitutional amendment.*’⁶

Next, under the A.P. Commission for Backward Classes act, which has been on the statute book since 1993, the government can add a group to or take away a group from the list of Backward Classes only after the case for doing so has been examined by the state’s Backward Classes Commission constituted under that act. It turned out that the state had not sought the advice of the Commission at all in regard to the backwardness or otherwise of Muslims. Nor had the Commission examined the matter at all. Two earlier commissions -the Anantaraman Commission and the Murlidhara Rao Commission – had examined the issue, and had come to the conclusion that as a class, Muslims are *not* socially and educationally backward, and that, except for a few sects, the other sects of Muslims enjoy equal status with followers of other religions. Those few sects that did suffer from social and educational backwardness – Dudekula, Mehtar, etc. – the commissions had said should be included in the list of Backward Classes, and given reservations. This had been done.

The decision of the Government is ‘entirely based’ on the report of its own department, the Commissionerate of Minority Welfare, the high court noted.⁷ And what kind of a report had this Commissionerate produced? This is what the high court found on examination:

- ‘The report on hand, to say the least, is *somewhat peculiar* ... The Commissionerate report *does not contain the details of any investigation or enquiry* as regards the social backwardness of Muslim Community,’ the high court noted. ‘There is *no finding recorded by the Commissionerate* as to the social backwardness of the community.’⁸
- ‘The report, in our considered opinion,’ the high court held, ‘is *vitiated for the reason of not taking relevant factors into consideration. It is also vitiated for the reason of non-application of mind.* This Court cannot help but observe that the Commissionerate *acted in undue haste in submitting the report.* The Commissionerate failed to realise the complex nature of investigation and enquiry that was required to be made. *No scientific or reasoned investigation or enquiry has been made. In the absence of laying down the criteria for ascertaining the backwardness, the entire report is to be treated as an exercise in futility. The approach adopted by the authority is improper and invalid.*’⁹

The government, as we just noted, was also duty-bound under Article 16(4) to determine that the Muslims as a community are inadequately represented in governmental services. This fact also cannot be ascertained mechanically for the expression that has been used in Article 16 is not ‘*proportional* representation’ but ‘*inadequate* representation’. Hence, one cannot just look up the proportion that a group forms of the total population and compare that with the proportion of posts that its members have in governmental services. The high court concluded that on this aspect also, the government had been totally remiss in what it was required to do by the Constitution and the relevant judgments of the Supreme Court:

- ‘In the instant case, *there is no material that was available with the Government to form its opinion,* which may be a purely subjective

process to arrive at any conclusion that the Muslim Community is not adequately represented in the services of the State. The data collected from Kurnool District [just one of twenty-three districts in the state] and incorporated in the report in no manner reveals inadequate representation of Muslim Community in the services of the state. There were no material and circumstances on which the Government could have formed the opinion as to the adequacy of representation of Muslim Community in the services of the state. In fact, the impugned G.O. [Government order] does not reflect any formation of opinion as to the adequacy of representation. The G.O., is therefore, *vitiated on the ground of non-application of mind.*¹⁰

Finally, the high court noted that reservations under Articles 15(4) and 16(4) in Andhra already totalled 46 per cent. With another 5 per cent now being reserved for Muslims, the ceiling of 50 per cent was being breached. The state has not been able to explain the compelling reasons on account of which this ceiling should be allowed to be breached, the high court concluded.¹¹

The response

As resounding a slap on the face of the government as one could imagine. And how did the government respond? It was headed by a committed secularist, remember, by a chief minister who was even then known as a go-getter – a reputation that would get reinforced in more ways than one in the ensuing years.

The high court had given its judgment in *Muralidhar Rao* on 21 September 2004. On 18 November 2004, the government wrote to the Andhra Pradesh Backward Classes Commission to examine the question of the backwardness of the Muslim community for assessing their eligibility for being given reservations in educational institutions and public employment. The commission gave its report – we shall soon learn what kind of a report this was – on 14 June 2005. Within the week, on 20 June 2005, the Congress government issued an ordinance – again reserving 5 per cent seats in educational institutions and governmental jobs for Muslims.

The ordinance was challenged in the Andhra Pradesh High Court. When the judges gathered in court to deliver their judgment, they were told that the ordinance on which they had been hearing arguments and on which they were about to pronounce judgment had lapsed. It had been replaced by an act. The court saw that there was no material change in the provisions, and merely noted in its judgment that wherever the word ‘Ordinance’ occurs, it shall be taken to refer to the act. Delivered by a five-judge bench, the second judgment of the high court – in *B. Archana Reddy v. State of Andhra Pradesh*¹² – was an even tighter slap than the first one. The ordinance/ act was struck down as unconstitutional and violative of Articles 15(4) and 16(4), the two articles under which it had ostensibly made the reservations.

An even tighter slap

The first feature that made the ordinance and the act wholly unconstitutional was precisely the one that had made them so attractive to a government so eager to pander to a vote bank – the boon that it was conferring was based wholly and solely on religion! From the title of the act – *A.P. Reservation of Seats in the Educational Institutions and of Appointments or Posts in the Public Services under the State to Muslim Community Act, 2005* – to its preamble, down to individual provisions, every bit of the text was designed to leave no doubt that it was intended for giving reservations to the Muslims as a religious community solely because it was the Muslim community. The classification of those who would get the reservations that were being provided and those who would not was based *only on religion* – something that is explicitly prohibited by Articles 14, 15(1), 15(2), as well as 16(1) and 16(2).

The prohibition is so stern and so patent, it has been reiterated by the courts so very often that one is left wondering as to what the Andhra government was doing, and that too repeatedly. Was it just being audacious and haughty – ‘I am the State. Who can come in the way of what I decree?’ Or was it being cleverer than we imagine? Was it the case that it did not really care whether or not it lived up to its promise of giving reservations to Muslims and, therefore, did not care that it was going about the matter in a way that was certain to be struck down by the courts? Or was it the by now familiar trick of enacting a statute that is patently unconstitutional, and then

blaming the courts for not being ‘progressive’ and ‘obstructing the path of social justice’?

In any event, this single feature – of basing the discrimination, in this case between Muslims and non-Muslims, only on the ground of religion – was the one on which the high court judges came down first. The ordinance is ‘religion specific’, the judges noted. It ‘imposes illegitimate, discriminatory and grossly burdensome impact on citizens, on those belonging to the existing notified Backward Classes and on those who are not members of Backward Classes, as well,’ they noted. ‘The inference is therefore compelling that the entirety of the state action manifested in the provisions of the Ordinance, is a crude camouflage to shield what is clearly a naked and exclusively religion based programme of reservation in educational institutions and public employment,’ they observed. The classification – of those who will get reservations and those who would not – is based exclusively on religion, they held.¹³

In this round, the government had indeed referred the question to the Backward Classes Commission for examination. But the Commission had just done a pro forma job. The Commission’s report ought to have been of the standard of a commanding performance, the court observed quoting the petitioners with approval, rather than a performance on command.¹⁴ This was made manifest by several facts.

The Commission had not published in advance the criteria on which it would be assessing backwardness – only if this had been done could those who had objections or suggestions have had a chance to assist the Commission with their views. ‘The prior non-publication of criteria and data collected by the B.C. Commission renders the report of the B.C. Commission illegal and contrary to provisions of B.C. Commission Act and principles of fairness.’¹⁵

In fact, whereas ‘an expert body like the Backward Classes Commission has to necessarily evolve absolutely relevant criteria for the purpose of caste test, occupation test and means test,’ in the case at hand, ‘the B.C. Commission did not evolve any criteria for identifying social backwardness and did not apply the three tests in a scientific and objective manner.’¹⁶

And such criteria as it used, and such data-gathering as it did were inappropriate and worse. So that it may determine whether a group is eligible for reservations, the Commission had to identify those groups among Muslims who were socially, educationally and economically backward – only such groups could be given benefit of reservations. As had been the case with the Commissionerate of Minority Welfare in the first round, in this round the Backward Classes Commission too had ‘totally ignored the existence of castes and communities and proceeded as if the entire Muslim community is a homogenous (sic) group without any visible divisions among the community. The entire approach therefore suffers from a fundamental flaw’ Treating Muslims of Andhra as a homogeneous group thereby papering over the internal differentia among them, ‘constitutes a fatal flaw in the conceptual foundation, adopted methodology and social survey of the Commission’s exercise and introduces an irremediable infirmity to its conclusions and recommendations.’¹⁷

And the court gave a telling analogy to pronounce what the Commission had done as ‘grotesque and unconstitutional’. It noted:

Classes of Muslims already recognized and identified as backward classes constitute a dissimilar and distinct class from those Muslims who have not been so identified. Conceptually treating such dissimilar classes as one violates the established principle of classification, a doctrine underwriting the equality injunctions mandated by Articles 14—16 of Constitution. The equivalence of the Commission’s endeavour and exercise, in the Hindu context, would be to take the entire Hindu collectivity including the several castes, groups and classes including the notified Scheduled Castes and Scheduled Tribes and other Backward Classes, and including the indisputable forward castes among the Hindus, like say the Brahmins, proceeding to survey, collect data, apply the criteria to such data and thereafter characterize the entire Hindu population including Brahmins as a backward class. Such an exercise would compellingly require to be characterized as grotesque and unconstitutional. This is what the exercise of the Commission is, but for the difference that the Commission’s exercise involved the entirety of the Muslim collective.¹⁸

The consequence is fatal, the high court noted: ‘In treating the identified Backward Classes of Muslims in the State of Andhra Pradesh and the other Muslims as an integral homogeneous social class, as the basis for its entire exercise, the Commission was led into a fatal error from which there is no redemption. As a consequence its exercise is rendered an exercise in futility. For this error its report including the Recommendations therein must perish

as must the Ordinance based exclusively on the Recommendations of the Commission.’¹⁹

Several of the so-called criteria that the Commission had deployed – occupation, extent of poverty, access to medical services, low life expectancy, etc. – the high court held, were neither germane to nor peculiar to the Muslims. Nor had the Commission made any effort to establish any causal relationship between these traits and belief in Islam or of belonging to the Muslim community. As such, the criteria that the Commission had used were ‘defective, unscientific, unreasonable and absurd.’²⁰

In regard to several other indices and data that the Commission had brandished, examination showed that its conclusions in instance after instance were ‘based on *no relevant evidence or material*’, that for them ‘there is *neither data nor details of the survey*, incorporated on record,’ that ‘the Commission had *no basis, in concept or fact* to support the conclusion that Muslims are socially backward’, that ‘the Commission’s conclusions *based on a composition of erroneous assumptions, are therefore unsustainable ...*’²¹

The Commission had not just pronounced all Muslims of Andhra to be backward, it had also declared that none of the existing backward classes have attained levels of advancement that warrant any revision of the existing reservation – this it had done manifestly so as to make out the case for exceeding the 50 per cent ceiling. ‘This conclusion,’ the court said of this business of no backward group having advanced, is ‘*extravagant and unfounded*’, it is based on ‘*no reference, no evidence, is perverse, invalid and is accordingly declared*’.²²

In fact, the situation had been worse. Far from identifying and differentiating those groups among Muslims in Andhra who really were backward, in the reliance it placed on some data, the Commission had not even differentiated Muslims in Andhra from Muslims in the rest of the country! For instance, to show that a proportion of Muslims in Andhra were unemployed, the Commission had deployed what turned out to be aggregate National Sample Survey data for the country as a whole!²³

And in other instances, the Commission had deliberately shut its eyes to data that could be seen from a mile to be intrinsic to the question it was

examining. To show that Muslims as a whole were educationally backward, it had used data regarding enrollment in only the general educational institution – it had totally shut out data about students enrolled in minority institutions, when these are legion in the state!²⁴

‘From the text and texture of the report of the Commission,’ the high court was compelled to conclude, ‘it is apparent that the Commission considered that it had to record a conclusion regardless of whether time and organizational constraints permit a degree of exercise relevant to the goal obligated by the Constitution and the provisions of the 1993 Act.’²⁵

Such was the ‘performance on command’ that the Backward Classes Commission of the state had turned in – and the state had justified its decision solely by the report of this Commission. But, the court noted, the government had gone one better!

While the Commission recommended 5% of reservation to all Muslims *including* those distinct classes/ groups of Muslims already included as Backward Classes (Laddaf, Dudekula etc), the Ordinance provided 5% reservation only in favour of Muslims *excluding* those already included in the list of Backward Classes. The existing Groups of Backward Classes A, B, C and D remain undisturbed.²⁶

As a result, *more than the 5 per cent* of the seats that the ordinance/ act had ostensibly set aside for Muslims would get reserved for them!

For these, and other reasons of the kind we encountered in the case of the first round, the five-judge bench of the high court struck down the ordinance/act as wholly violative of the Constitution and wholly contrary to what the Supreme Court had laid down in its decisions.

The high court handed down this stinging rebuke on 7 November 2005. The government requested that it be given leave to appeal to the Supreme Court. Leave was granted.

That leave petition remains pending to this day. But how could that mere fact come in the way of that go-getter’s government?

The third slap

17 April 2007: The Andhra government asked the Backward Classes Commission to do the exercise again, and, this time, identify the socially

and educationally backward groups among Muslims. Incidentally, in making that request the government quoted the wrong section of the relevant act!

18 May 2007: Even as the Commission was ostensibly carrying out the exercise, the government appointed a retired IAS officer, P.S. Krishnan as advisor and asked him to identify the backwards among Muslims.

11 June 2007: A month had not passed, and Krishnan submitted his report to the government.

11 June 2007: The same day, the government sent Krishnan's report to the Backward Classes Commission.

23 to 26 June 2007: The Commission declared that it would conduct its own state-wide survey during these – all of three -days. Even on its own telling, this statewide survey was to be done in – the easily accessible areas, chiefly town – just six of the state's twenty-three districts.

29 June 2007: The Commission completed 'the collection of the data, compilation of the survey material and discussion on the collected material'.

2 July 2007: That is, *within two days of* completing the collection, compilation and discussion of the data, the Commission handed its 204-page report to the government!

6 July 2007: The government issued an ordinance – once again decreeing 5 per cent reservations for Muslims in educational institutions and in government services.

13 August 2007: The Andhra legislature passed the corresponding act – *The Andhra Pradesh Reservation in Favour of Socially and Educationally Backward Classes of Muslims Act, 2007.*

There was one manifest improvement! While the title of the 2005 Act had stated that the reservations were being made for the 'Muslim Community,' the 2007 Act maintained these were for 'Socially and Educationally Backward Classes of Muslims'!

The act was challenged in the high court. The case was heard by a seven judge bench. By a majority judgment, the court struck down the act as 'unsustainable'.²⁷ Apart from the other reasons which the court set out in detail, and which traversed the grounds that we have already encountered, there were others. Among these was the basic one: the act had proceeded to

classify beneficiaries and non-beneficiaries in an unconstitutional way – that is, on the basis of religion only. To take just two instances: examination showed that the identification of backward classes among Muslims was both irrational and unsustainable, and thereby ‘exclusively religion specific’; and, second, in a giveaway, the act had prescribed benefits for ‘other Muslim groups’.

Apart from the fact that the act was unconstitutional for this basic reason, the high court drew attention to another consequence of this religion-specific identification of beneficiaries. The point is best considered by reading what the court itself said:

If a person, who is not a Muslim and who belongs to a forward caste embraces Islam, then the question would arise as to in which group he would fall. If he does not belong to any of the groups specifically narrated in the Schedule appended to the impugned Act, he would be included in ‘other Muslim groups’ i.e. he would be in Item No. 15; but as he would not be in groups which have already been referred to in Item No. 15 (i.e. the excluded communities), he would be a member of ‘other Muslim groups’ and would be eligible for the reservation provided he is not a member of a creamy layer. In such an event, in our opinion, anyone can avail of the benefit of reservation under the impugned Act and that would be against the spirit of secularism and in equal measure subversive of the purposes for which the 2007 Act has been enacted as well. This is a significant aspect which has not been considered at all while enacting the impugned Act and this would have disastrous consequences. Not only unscrupulous persons embracing Islam would get the benefit of reservations, but that would result in depletion of opportunities of enjoying reservations by those Muslim groups who are otherwise entitled to the benefit of reservation in pursuance of the impugned enactment.²⁸

The other reason on account of which the judgment declared the act to be unsustainable was that it was based exclusively on the report of the Backward Classes Commission, and this report, it turned out, was even more of a farce than the previous so-called reports on which the government had ostensibly based its largesse.

To begin with, even the advocate general admitted that ‘in certain cases there was perhaps no justification for including certain Muslim groups in the list of Backward Classes, except for the reason that their Hindu counterparts were already included as SEBCs, and for this reason, the Commission, without any survey to ascertain their way of living, level of education and economic condition, had recommended certain groups to be included in the list of Backward Classes.’²⁹

And what of the cases in which the Commission had actually conducted a survey?

The court found, to begin with, that in the overwhelming proportion of cases, the Commission had in fact not conducted any survey at all. It had just reproduced passages and narrative from a study conducted in another context under the Anthropological Survey of India and that report of P.S. Krishnan! And even in doing so, it had both misstated facts, and worse.

In regard to a group – ‘Atchukatlavandlu (Muslims)’ – the Commission stated that it had conducted a survey in Kadapa and Adilabad districts of the state. But the Anthropological Survey study on which it was relying contained no discussion about this group of Muslims! What the latter had described was the Hindu counterparts of this group!

In regard to another group – ‘Faqir/Fhakis Budbudki’ – the Commission had stated that they reside in certain areas, which it had listed, of the Rayalseema region. But the staff of the Commission had conducted their survey of this group in the Telangana region! And that survey, did not establish backwardness to boot.

As regards another group – ‘Siddi’ – the only justification that the Commission could come up with for their being included in the list of backwards was that a group with the same name in Gujarat was recognized as a Scheduled Tribe, and one in Karnataka of that same name had been included in that state’s list of backwards!

In regard to another group – ‘Garadi’ – the Commission had indeed conducted a survey. It had surveyed all of *seven households comprising forty persons in one district*, Medak! And, surprise of surprises, ‘Of those who had been surveyed, 100 per cent of them had stated that they were *not* given any discriminatory treatment by the society and they were also *not* in their traditional occupation. Moreover, they had *all* submitted that they were treated as normal social beings by the other members of the society.’ ‘In spite of the above facts gathered by the Commission,’ the high court observed, ‘it had recommended that “Garadi” community be treated as socially and educationally backward.’ ‘It is also pertinent to note,’ the high court continued, ‘that the total population of the Garadi community was not known...’

In regard to the ‘Gosangi’ community which too the Commission had anointed as backward, ‘data from *only one family* had been gathered by the

Commission in Nizamabad district...’

Similarly, the Commission had recommended the inclusion of ‘Chakketakare community’ among backwards on the strength of having surveyed *six households comprising twenty-nine persons* in one district.

As for the ‘Guddi Eluguvallu’ whom also the Commission declared should be recognized as backward, *‘no survey whatsoever had been conducted and no data had been collected by the Commission.’*

‘Likewise,’ the high court noted in conclusion, ‘with regard to other communities also, we find that the Commission had not conducted the survey objectively to justify its recommendations.’ The Commission just could not have conducted a survey in the extremely short time between its being asked to examine the matter, and the date on which it submitted its report, the high court noted. As already pointed out, the records of the Commission themselves showed that some of the so-called data had been gathered by it on 28 and 29 June 2007. And within two days the Commission had not just analysed the data, and had discussions on it. The Commission had completed and submitted a written report covering 204 pages!³⁰

After a detailed analysis of the so-called survey that the Commission had claimed to have conducted, the judges concluded that the Commission had failed to evolve and spell out proper and relevant criteria for identifying those who were socially and educationally backward, and for those who were inadequately represented in public employment; that it had failed to obtain even the figures of total population of the groups it was ostensibly identifying; that it had failed to utilize any scientific and statistically rational method of sampling the group – the size of the sample, the locations where it would be conducted, etc.; that it had failed to apply uniformly such criteria or even standards as it had alighted upon; and that, instead, it had relied on the study of the Anthropological Survey of India which *‘had no relevance or nexus with the affirmative action/reservation under Articles 15(4) and 16(4); that ‘no material’ had been placed before the court to prove that the classifications on which the act was based had any nexus with the policy and objectives that had to be achieved; that, in the absence of such material, the state government ‘has utterly failed to discharge its onus of proof to establish that the reservations are for socially*

and educationally Backward Classes of citizens and that the enactment is based on sufficient material to support the classification And hence that the investigation carried out by the Commission ‘is not sufficient, and the report submitted by it is *not based on real facts, data or analysis and is without any proper survey...*’, and, therefore, that the report should be held to be mechanical, and perfunctory in nature and to have been prepared without application of mind ...³¹

A portent

Incidentally, before we move on we have to note one feature of the judgments in this case as it presages what is to come. In a case such as this, they were bound to examine the basis on which the legislature and the government had acted, the judges pointed out. They had to subject the provisions of the law and the basis on which benefits under it had been assigned to ‘rigorous’ or ‘strict’ scrutiny, they pointed out, citing a number of Supreme Court judgments and even weightier reasons.³² One judge demurred. Such scrutiny is not warranted, he maintained. When the legislature passes an act, we must proceed on the presumption of constitutional validity of the enactment.³³ The others pointed out that ‘All the judgments touching upon reservations consistently applied exacting scrutiny. In *Indra Sawhney’s* case ... the Hon’ble Supreme Court analysed the Mandal Report minutely, which, in our view, exemplifies application of rigorous and exacting standard of scrutiny.’³⁴ They agreed that, yes, in the normal course, there should be a presumption of constitutionality, ‘However, such a presumption of constitutionality of a statute is not available if it can be shown that facially [sic] the law or the surrounding circumstances on which the classification is based did not warrant such a classification and the statute made an invidious discrimination among citizens similarly situated And when the constitutionality is challenged and a prima facie case is made out regarding the defectiveness of the statute, the burden of establishing constitutionality shifts to the state ...³⁵

Both the fact that the classification in the act was based on religion only, as well as the cavernous lacunae in the survey on which the list of

backwards had been drawn up established the infirmity of the act prima facie. But that judge's response was astonishing.

As for the identification of groups being religion-specific -something that is expressly forbidden by the Constitution – the judge held, that is no flaw, in fact it is justice being done at last! Here is how he put his conclusion:

When the state of A.P., holds the view that coverage under Articles 15 and 16 of the Constitution in respect of certain social groups among Muslims have [sic] been missed until the impugned Act even while the same coverage in respect of other religious communities have [sic] been in existence since long time, the Court cannot accept any challenge to the Act on the ground that it is religion-specific. On the contrary, the impugned Act is an act of delayed rectification of injustice done to them all along and extending justice to the now included social groups who have been identified not on the basis of their religion but on the parameters of social and educational backwardness ...³⁶

And as for the gross infirmities in the 'survey', as for the Commission having relied – to the extent of having reproduced verbatim – reports that had no nexus with the question it had to examine and the identification it had to carry out, the judge was equally large-hearted! He declared,

Irrespective of any inadequacies or deficiencies in the APCBC [Andhra Pradesh Commission for Backward Classes] report and other materials

In the light of what we have seen were the facts regarding the report of the Commission and its 'survey', how tender are the words the judge had chosen, '*inadequacies or deficiencies*'!

once a legislation is enacted the judiciary has to take into account the principle of presumption of constitutional validity of any legislation under the Indian Constitution and set it aside only if there is anything in the legislation which strikes the conscience and strikes the eye as totally unreasonable. This is not the position in the present case.³⁷

If only such large-hearted judges were an exception.

An even more ominous portent

The second, and even more ominous portent came from the way the matter moved in the Supreme Court itself.

The Andhra Pradesh government had accepted the judgment of the high court in the first round. In the second round, when the high court struck the ordinance and act down as unconstitutional, it sought leave to appeal. As we noted above, the appeal was granted.

The government went to the Supreme Court and asked that the judgment be reviewed and in the interim its operation be stayed. A three-judge bench of the Supreme Court, headed by the Chief Justice, directed that, in view of the substantial questions of public importance that are involved, the matter be placed before a Constitution bench. It turned down the Andhra government's request to stay the operation of the judgment of the high court. From the order of the Supreme Court you will see the sort of specious arguments that are advanced by governments. The government said in effect, identification of social and educational backwardness is a precondition only when it comes to giving reservations in educational institutions under Article 15(4). Article 16(4) allows us to make reservations in public employment for classes that are not adequately represented. So, we should be allowed to proceed at least with the latter, and the high court judgment should be stayed.

Of course, Article 16(4) lays down two conditions: not just that the classes for whom reservations are being made in government services are inadequately represented but also that they are 'backward'. Hence, determination that the classes for whom reservations are being made are backward is as essential in the context of Article 16(4) as it is in regard to reservations being made under Article 15(4). The Supreme Court focused on another telling point. The ordinance in question itself stated the objective for which the reservations were being made. In doing so it referred to 'social, educational and economic backwardness of the members of the Muslim community residing in Andhra'. Hence, identification of the groups that are actually backward was of the very essence of the exercise in this instance also.

'Having heard the learned counsel and having perused the Constitutional provisions and the report [of the Andhra Pradesh Commission for Backward Classes] as also the impugned judgment, we are not inclined to stay the operation of the impugned judgment and make operational a law which has been invalidated by the High Court, as an interim measure.'³⁸

That was the second round – the appeal of the Andhra government has remained where it was, pending before the Supreme Court for the last five years.

It is in the third round that the portentous thing happened. As we have seen, the high court had struck down the 2007 Act also as unsustainable and unconstitutional. The Andhra government went to the Supreme Court in appeal – it requested that the high court judgment be reviewed, and that pending the review, it be stayed. The bench headed by the then Chief Justice K.G. Balakrishnan, did the opposite of what the bench headed by the then Chief Justice of the same Supreme Court had done earlier. It referred the case to a Constitution bench all right, but, even as it did so – that is, even as it concluded that the constitutionality of the act had to be determined and ‘several constitutional issues are involved’ – it stayed the judgment of the high court, thereby, to use the words of the earlier bench, made operational a law which the high court had found to be wholly unconstitutional. ‘As an interim measure,’ it said, the 4 per cent reservations that have been given to Muslims listed in the schedule of the act shall continue – save that they shall not be extended to ‘Other Muslim groups’. ‘This is a temporary measure,’ it said, ‘till the matter is decided.’³⁹ To mandate implementation of legislation that has been declared unconstitutional by a high court is patently contrary to the settled law on the subject. No court has the power to do so, not even the Supreme Court.⁴⁰

The order of the Supreme Court concluded with the words, “These matters are referred to the Constitution Bench to be listed in the 2nd week of August 2010 along with CA. 7513/2005⁴¹ for appropriate directions.’

We are in February 2012 as I type this – hence, a two-year-long foot-in-the-door! And the argument will be that, reservations having been available to Muslims now for over two years and their having got accustomed to availing of them, reversing course now will inflict great injustice and lead to massive resentment and backlash...

The politicians' response

In Article 15(1), the Constitution had provided, 'The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.' Soon, in fact within a year of the Constitution being adopted, another clause was added to Article 15 – '(4) Nothing in this Article or in sub-clause (2) of Article 29 shall prevent the state from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.'

This new clause became the gate for reserving seats in educational institution – and, as we have seen, pious denials notwithstanding, the principal basis on which reservations were made was caste. As the years went by, both because the state did not expand the number of schools, colleges, technical institutions and also because the standards of instruction in governmental educational institutions went the way of other governmental institutions, a number of educational institutions came to be established in the private sector. Politicians who had set themselves up on caste politics wanted a hand in these private institutions also. The first salvo was to demand that institutions that were receiving aid or assistance in any form must set aside seats for the constituents of these politician – that is, on the basis of caste. Soon, the cry became shriller – even those institutions which were not taking any aid from the state must reserve seats. After all, their courses and degrees, etc., were being given recognition by the state and its limbs; their wards were being allowed to appear for examinations that had the imprimatur of the state and of institutions set by it. Incidentally, report after report of commissions and committees set up by the state itself showed that these very institution – the University Grants Commission, the Medical Council of India, the All India Council of Technical Education, and other similar bodies – were as responsible as any Organization for the rot in

India's higher education system! In any event, the eyes of casteist politicians were on institutions that had been set up outside the sphere of and without any help from the state. They insisted that these institutions must also set seats aside on the basis of caste. The court – capped by the Supreme Court – struck down such claims on the ground, among others, that compelling such institutions to do so would be to infringe the freedom 'to practise any profession, or to carry on any occupation, trade or business' of his choice, a freedom that has been guaranteed to every citizen by Article 19(1)(g).

And so, in 2005, by the ninety-third amendment another clause was added to Article 15. Article 15(5) reads:

Nothing in this Article or in sub-clause (g) of clause 1 of Article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes insofar as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of Article 30.

Four points are manifest:

- The clause was worded precisely to overturn what the Supreme Court had held. Henceforth, the state would be able to decree reservations in
- Private educational institutions
- Whether these receive or do not receive aid from the State
- Except in institutions that are 'minority institutions'.

And, as will be obvious, apart from the effect that they shall spell for education, these limbs of the new clause lead to three portentous consequences:

- They mark an ingress of state-decreed reservations into the private sector.
- Thereby they pave the way for the next demand: 'When the educational institution run by industrial house 'X' is providing reservations, why not the factory that is being run by the same industrial house?'

- The clause widens even further the gap between the privileged position that has come to be accorded to an institution set up and managed by a minority – say, a Christian college or one set up by a group or family that happens to be Muslim – and a run-of-the-such secular college. This is all the more so because governments have relied on, and the courts have legitimized their relying on an expression that occurs in Article 30 – that minorities shall be allowed to set up and manage institutions ‘of their choice’. As we will see in the following chapter, this last expression has been taken to mean not just that they may set up such institution as they choose would best protect and advance their language, religion or culture, but any institution ‘of their choice’. As a result, a group of Muslims or Christians set up a dental college, say. It has nothing to do with preserving or advancing their language, religion or culture. It turns out dentists pure and simple. This college shall not be asked to reserve such-and-such proportion of seats for any category of students. But a dental college that has been set up across the road by a group or family that does not happen to belong to a minority *shall* be subject to the decrees about reservations that the government puts out. Secondly, institutions that can show that they are minority institution – like the college from which I graduated, St Stephen’s College in Delhi – can reserve seats purely on the basis of, in the case of St Stephen’s College, religion, something that would have been anathema to the founders of the Constitution.¹

Provisions in regard to public employment have been dragooned down the same sorry road.

The basic provisions remain Article 16(1) and 16(2). They lay down:

16. Equality of opportunity in matters of public employment. – (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

and that

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

But by one cut after another, they have been rendered into hollow, I would say deceitful invocations.

Clause (4) of the Article had provided:

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

Manifestly, the general rule was to be non-discrimination. Clause (4) was included to provide an exception. And that is how it was seen by the founders. Dr Ambedkar's observation is often quoted: the exception should not be so large, he had warned, as to swallow the rule. And the figure that he had used to illustrate the magnitude that the founders had in mind, was 30 per cent. And that is how the courts saw the relative position of the two clause – clause (4) was the exception to clause (1), and it cannot be used to eclipse the general rule enshrined in clause (1) of the article, they held. In the well-known case of *General Manager, Southern Railway v. Rangachari*, the Supreme Court declared that clause (4) is meant merely to enable the state to give adequate representation – *adequate* representation, not representation 'proportional to population' or anything of that kind – to backward classes in public employment. The clause cannot be used to trample upon the legitimate rights of other employees guaranteed by clause (1) of the Article.² In *M.R. Balaji v. State of Mysore*, the Supreme Court struck down 60 per cent reservations as being excessive, and held – in contrast to the 30 per cent figure that Dr Ambedkar had used to illustrate the limit – that reservations should not exceed 50 per cent.³

By the mid-1970s, leftist discourse had taken over. This was reflected in the Constitution itself: among the things that Mrs Indira Gandhi and her entourage did to give a veneer of legitimacy to the Emergency was to add words to the Preamble. By the grace of the notorious forty-second amendment, India was now to be not a mere 'Sovereign Democratic Republic' that the founders had envisaged. It was going to be a 'Sovereign Socialist Secular Democratic Republic'. So, when the question came up in *State of Kerala v. N.M. Thomas* whether qualifications could be diluted in government service in the interests of candidates from some castes, the progressives took off. The classes are ones that have been subjected to

handicaps, the judges reasoned. The posts are just clerical ones, they reasoned -after all, the case in question concerns only lower division clerks being promoted to posts of upper division clerks. It isn't that qualifications are being done away with, they are just being relaxed, the judges reasoned. In any case, and this was the great leap, clause (4) is *not* an exception to (clause) 1. It is *a facet* of the article, a coequal facet of the Article. The limit of 50 per cent cannot have immutable sanctity, they reasoned: in a remark that would be invoked often by progressives in the ensuing decades, Justice Fazl Ali said that when the class that is judged to be backward and inadequately represented in governmental service is 80 per cent of the population, what is the sanctity of holding reservations to less than 50 per cent?⁴

The beleaguered V.P. Singh lunged for Mandal. Those decisions were challenged and led eventually to one of the watershed judgments in this sphere, *Indra Sawhney v. Union of India*, a judgment that we have examined in detail earlier in the book. There were many elements of even this judgment which, for reasons that have been set out in this book earlier, are fraught with danger. To many of them, in his prescient dissent, Justice Kuldeep Singh drew pointed attention. Among propositions that are fraught with danger are:

- The acceptance of the central premise that had been and continues to be used to justify every enlargement of reservation – the premise that Article 16(4) is not an exception to Article 16(1), that it is just a specific instance of the classification between beneficiaries and non-beneficiaries that inheres in Article 16(1);
- Caste can be, and often is class in India, and, therefore, it can well be the basis for, though not the sole basis for, in any case it can be the starting point for identifying beneficiaries of a scheme of reservations;
- There are no fixed procedures or criteria for identifying backward classes. The state should setup a standing mechanism for identifying them in the form of commissions for Backward Classes.

For the moment, we have to recall just a few points in the decision as they have a bearing on subsequent events:

- Article 16(4) speaks of *adequate* representation in governmental services, not representation according to the proportion that the group forms in the population.
- The exception cannot swallow the rule; hence, reservations shall be limited to 50 per cent – except in extraordinary circumstances; were reservations to exceed half the number of posts to be filled, the fundamental right to equality, which is an element of the Basic Structure of the Constitution, would be breached and this is impermissible.
- The group or class to which reservations are being given has to be homogeneous – that is the only way in which equals within that group will be treated equally. Those in that class – for instance, those in a backward caste who have broken through and attained proficiency and asset – who in their income, assets, education, social acceptability and integration are markedly above the rest, must be kept out of the ambit of reservations. For one thing, if they are included, the benefits of reservations will be hogged by them and the truly backward will not get the benefits of the policy. For another, the policy is mandated for a *class*. When these ‘forwards’ are included as ‘backwards’, the class no longer remains a homogeneous class. Hence, in each instance, the ‘creamy layer’ must be hived off, and reservations must not be given to that section.
- Reservations shall be only at the point of entry; they shall *not* be in promotions; were reservations to be made in promotions also, the efficiency of administration would suffer, and that would violate the mandate set out in Article 335.
- The 50 per cent limit for reservations shall apply to the intake in each year; it shall *not* be reckoned with reference to the strength of the cadre as a whole. If the reserved seats cannot be filled – for instance, if, in spite of concessions and relaxations which had by then become customary, a sufficient number of candidates is just not available to fill the posts that have been reserved – the posts shall revert to be filled by the general category candidates. It was easy to see that unless the limit of 50 per cent was applied to the intake of each year, the general category candidates could get excluded entirely, and by the time their turn came, they would have crossed the age limit for entry; and this

deprivation would deprive these non-backwards of their fundamental right to be treated equally in matters of public employment; and thereby an element of the Basic Structure of the Constitution would have been violated; moreover, carrying the unfilled vacancies to subsequent years would adversely affect the efficiency of administration and thus fall foul of Article 335.⁵

- Special skills and specialization are so necessary for certain services and certain posts that in them only merit should determine intake. They should be kept out of the ambit of reservations. Unless efficiency in governmental operations is insulated in this way – and by keeping reservations under 50 per cent, confining them to entry and keeping promotions out of their reach – governmental efficiency would be jeopardized and the mandate of Article 335 – that in the making of appointments, the claims of Scheduled Castes and Tribes shall be taken into consideration ‘consistently with the maintenance of efficiency of administration’ – would be violated.

The political class lost no time in breaching the dyke. The Supreme Court had itself dealt a double blow in its judgment in *R.K. Sabharwal v. State of Punjab*.⁶ In that case, the court had held that when *Indra Sawhney* had specified that reservations must not exceed 50 per cent in any particular year, it had been considering reservations only in initial appointments. Hence, the restriction it had prescribed must be confined to initial recruitment. In *promotions*, not the number to be promoted that year should be considered; the total strength of the cadre must be reckoned! Punjab had reserved promotions to posts according to a roster – posts bearing specified numbers could only be filled by persons belonging to specified castes/classes. The posts were not confined to the lower levels of the service: posts of executive engineers, superintending engineers and chief engineers were also to be filled in accordance with the roster. The rules specified that a person should have served ‘X’ number of years before being promoted to the next level in accordance with the roster. But the government had inserted the customary proviso:

Provided that, if it appears to be necessary to promote an officer in public interest, the Government may for reasons to be recorded in writing, either generally for a specified period or in

any individual case reduce the period specified in clauses (a), (b) and (c) to such an extent as it may deem proper.

As a result, one reservationist had got promoted to the position of chief engineer by superseding thirty-six senior colleagues. Two reservationists had been promoted to the position of superintending engineers superseding eighty-two and eighty-seven senior colleagues respectively. Once the roster is drawn up, it must be strictly adhered to, the court held. Reservationists can be promoted to posts that are reserved for general category candidates: in instances where they do get promoted to these posts, their number shall *not* be counted against the reserved posts. But general category candidates shall *not* be allowed to occupy posts that have been reserved for those of backward castes/classes. As for the ceiling the strict operation of the roster itself would ensure that the ceiling would not be breached.

The judgment dealt a double blow in that it further legitimized reservations in promotions, and it lifted the ceiling sky-high: the number of vacancies in a particular year in some higher post would manifestly be a small proportion of the total number of posts in the cadre, and, if they could not be filled by reservationists in a particular year, they had to be carried forward to subsequent year – irrespective of the fact that they may be exceeding 50 per cent of the promotions in that subsequent year. There was a third incipient element in the judgment which was equally destructive, though, as the allusions could be taken to be merely illustrative, it received little comment at the time. In *Indra Sawhney*, the Supreme Court had drawn pointed attention to the fact that the Constitution spoke of *adequate* representation, not representation proportionate to, for instance, the share of the class in the country's population. But in *R.K. Sabharwal*, the judgment at two places linked the share that the reservationists are to have to the share of those 'classes' in the population, and by allusion legitimized such a demand.⁷

Suddenly, the political class – which had been passing amendment after amendment to overturn judgments of the Supreme Court – felt great fidelity to the rulings of the court: we must give legislative effect to the decision of the Supreme Court, the argument went.

Within two-and-a-half years of the *Indra Sawhney* judgment, in 1995, Parliament passed the seventy-seventh amendment. It added a new clause to

Article 16, clause (4A). The clause reads:

(4A) Nothing in this article shall prevent the State from making any provision for *reservation in matters of promotion to any class or classes of posts* in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

O, it is just an enabling provision, the argument went. O, it is confined to Scheduled Castes and Scheduled Tribes, the argument went. You just want them to remain the hewers of wood and carriers of water forever, went the charge. What is the point of enabling them to just get into government service? Power lies in the higher reaches. And so does prestige – it is only when they come to man the higher posts that the age-old prejudices against them will go, went the argument. The crucial points, the ones that would have the gravest consequences in future were different. A class of persons would now not just get into services of government because of their birth. They would get to ‘any class or classes of posts in the services’ because of their birth. And there were the two meta-consequences: the principle that advancement should depend solely on merit and performance was breached further; and the psychology of entitlement was fanned further. As for prejudice, Dr Ambedkar is the one who had expressed the apprehension: it is quite possible that others will come to *look down* on a colleague, he had warned, knowing that the person had made it into the institution only because the places were reserved for those who would not otherwise have made it.

The next holes in the dyke came successively in 2000 through the eighty-first and eighty-second amendments.

The first thing to be breached was the 50 per cent ceiling. In 2000, by the eighty-first amendment, Parliament added a new clause -clause (4B) – to Article 16. The new clause reads,

(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

Vacancies that could not be filled in any year would now be carried over ‘to be filled up in *any succeeding year or years*’. In its judgment in *R.K. Sabharwal*, the Supreme Court had sidestepped what it had held in *Indra Sawhney* on the ground that the judgment in that case had dealt with initial entry into a service, and what it was now deciding was the case of promotions. The political class reasoned in the opposite way! As the Supreme Court has itself accepted in regard to promotion – a much more consequential matter – that the strength of the entire cadre shall count and not the promotions in a particular year, it is but natural the same ‘principle’ be recognized for backlogs in initial entry!

Exactly what, in *Indra Sawhney*, the Supreme Court had said *might* happen, was now made certain. Assume that 50 per cent positions have been reserved. In a year, because of a paucity of candidates from the castes/classes for which reservations have been decreed, only 30 per cent are filled. Were this pattern to be repeated for just the two succeeding years, general category candidates would be barred from the positions completely: 50 per cent of seats in the fourth year would be reserved under the basic quota, and (20+20+20) per cent would be reserved as having been carried over from the previous three years.

Moreover, the new clause provided that the vacancies that had been carried over and were now reserved shall *not* be counted when considering whether the ceiling – that reservations must be below 50 per cent – had been breached. Clearly, if 50 per cent of the seats are reserved, and some remain unfilled in a particular year, by the very next year the ceiling would be breached.

Notice also that, as Arvind Datar points out in his *Commentary*, the new Article 16(4B) referred to reservations under both -Article 16(4) as well as 16(4A). The former concerns reservations at induction in favour of ‘any backward class of citizens’, and the latter concerns reservations in promotions in favour of Scheduled Castes and Scheduled Tribes. As a result, the ceiling has been rendered otiose in both respect – at the point of entry it can be breached in favour of Scheduled Castes and Tribes and Other Backward Classes; in promotions, it can be breached in favour of Scheduled Castes and Tribes.⁸

These two changes had blown gaping holes in the dyke that *Indra Sawhney* had tried to put together. But the politicians were scarcely done as yet. Pandit Nehru and others had been intensely concerned about improving efficiency in the functioning of government. The Supreme Court had time and again expressed as much concern on this count. In *Rangachari's* case that we have encountered earlier, for instance, it had warned that 'the efficiency of administration is of such paramount importance that it would be unwise and impermissible to make any reservation at the cost of efficiency.' Although with less and less ambiguity, the court had continued to hold that the mandate enshrined in Article 335 must not be forgotten. That Article had specified an implicit restriction on reservations:

Article 335. Claims of Scheduled Castes and Scheduled Tribes to services and posts: The claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, *consistently with the maintenance of efficiency of administration*, in the making of appointments to services and posts in connection with the affairs of the Union or of a State.

Accordingly, in *Indra Sawhney* the Supreme Court had emphasized the mandate of not doing anything that would jeopardize efficiency of administration – it had specifically cited the article in turning down demands for according 'consequential seniority' to reservationists who had been promoted because of the roster system, and in turning down reservations in promotions. Following what it had held in *Indra Sawhney*, in a case such as *S. Vinod Kumar v. Union of India*, the Supreme Court held that, notwithstanding the new Article 16(4), and even on the assumption that because of this insertion reservations in promotions were now permissible, the qualifying marks and other standards cannot be lowered for promoting any class of reservationists.⁹ The eighty-second amendment, passed in 2000, overturned this entire string of judgments, and rendered meaningless the injunction that the efficiency of administration be kept in mind while considering the claims of Scheduled Castes and Scheduled Tribes. It did so by adding a proviso to Article 335. The proviso reads:

Provided that nothing in this article shall prevent in making any provision in favour of members of the Scheduled Castes and the Scheduled Tribes for *relaxation in qualifying marks in any examination or lowering the standards of evaluation*, for reservation in matters of *promotion to any class or classes of services or posts* in connection with the affairs of the Union or of a State.

Standards could henceforth be relaxed – to an unspecified extent – not just for entry into a governmental service but for promotion. And the relaxations were no longer to be confined to those lower division and upper division clerkships. They would be available ‘in matters of promotion to *any* class or classes of services or posts’.

But what is the use of merely getting promoted to a post out of turn? the new demand now ran. When it comes to being promoted to the even higher post, the reservationists must have the seniority that is their due by virtue of having been promoted earlier to this post. This was the demand for ‘consequential seniority’. In *Union of India v. Virpal Singh Chauhan*, the Supreme Court held that, as a person had been promoted earlier only because of the roster system – that diabolic device of extreme inequity which we have noticed earlier – he would not be entitled to claim seniority over other – who in fact had been his seniors in service and at the previous post – on the ground that he had been promoted to this particular post earlier.¹⁰ Incidentally, during the proceedings, a typical instance had been brought on record: eleven vacancies had arisen at a higher level. Thirty-three candidates had been considered for them. Each and every one of them was from the Scheduled Castes and Scheduled Tribe – general category candidates had been excluded from consideration altogether. As usual, the court had just noted the fact in passing, and passed on.

Arguments contrary to these had prevailed in a string of cases. The resulting discord among judgments of the Supreme Court itself gave the political class an opening. Politicians scarcely need one. But what the Supreme Court did gave them a convenient opening. In two decisions delivered in 1996 and 1999 – *Ajit Singh Januja v. State of Punjab* – the Supreme Court upheld the view it had taken in *Virpal Singh Chauhan*’s case: the seniority of a reserved category candidate and a general category candidate in promotions shall be determined by their respective positions in the panel. No extra weight shall be given to a reserved category candidate by virtue of the fact that – as a result of the roster system and other similar arrangement – he had been promoted earlier as doing so would grossly violate the Fundamental Right to equality of other employees. But in another case, *Jagdish Lal v. State of Haryana*, the same Supreme Court held in favour of the reserved category employees: they were entitled to seniority

over others as a consequence of the fact that they had been officiating in the position for a longer period, it held.¹¹ The question came up before the Supreme Court yet again. The court now overruled its judgment in *Jagdish Lal v. State of Haryana*, and held that, as equality is a fundamental right guaranteed to all employees by Article 16(1), and as Articles 16(4) and 16(4A) are only enabling provisions, the interests of the general candidates, as of the society at large too, have to be balanced against those of reserved category employees who had been given the benefit of faster promotions.¹² Two years later, the Supreme Court confirmed its view that reserved category candidates could not be given seniority over their general category senior – it added an additional reason for its conclusion: *Indra Sawhney* had emphatically held that the creamy layer must be excluded from availing the benefits of reservations; the reserved class candidates who had leapfrogged over others because of arrangements like the roster are at par with the creamy layer, and must, therefore, be excluded from further benefits.¹³

Manifestly unfair, the casteists said. Utter confusion, the go-alongers said. And so, in 2001, Parliament enacted the eighty-fifth amendment. It further modified clause 4A of Article 16. The clause was henceforth to read:

(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, *with consequential seniority*, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

Blow by blow, the political class hacked away at the original guarantee of equality. Blow by blow, it pared away the imperatives of efficiency and performance. Blow by blow, it enflamed and legitimized the psychology of entitlement. Blow by blow, it emboldened casteism, and ensured that henceforth politics would revolve around castes, the whole – the country – be damned.

A few basic determinants

A few features are apparent even at this stage.

Politicians have become more and more desperate pursuing banks of votes. The result is that reservations continue to be extended to more and more spheres. The only two spheres that are left are the armed forces and the private sector. In the former, the attempt by one defence minister to have a census done by caste and to influence appointments was defeated by just a hair's breadth. In the latter, as we have seen in listing the recent amendments, a beginning has already been made in educational institution – even if they are unaided. Similarly, caste considerations have already crept into the judiciary: in one well-known instance, appointments were held up till a particular person from a particular caste was appointed – a person who acquired conspicuous notoriety later on. One ominous development that will have set a grave precedent for the judiciary has just got deferred for a while, and it got deferred for reasons other than the principle of reservations. The demand for reservations in the Lok Pal was conceded by all political parties. The only part to which any significant objection was raised, and that also just by one party, was for reserving some of the seats in the institution on the basis of religion. As the Lok Pal would in effect be at par with the Supreme Court, this will be one of the most consequential inroads of reservations into the judicial sphere – for the argument will be, 'When there can be reservations in Lok Pal, why not in the Supreme Court?'

Second, more and more groups are continuing to be given the benefit of reservations. As we have noticed earlier in this study, these are not groups that are weak and to whose plight some compassionate leader has awakened. They are ones that have become strong enough – through numbers, through organization, through intimidation and militancy – to wrest the benefit from timorous politicians.

Third, the basis for identifying beneficiaries remains caste. That religion too must become a basis has now entered discourse – from the actual decrees that were issued by the Andhra government to the promises that became the norm among 'secular parties' in the UP Assembly elections in February-March 2012. A caste-based census, something that the country had shunned since 1931, is under way.

By themselves these features are enough to accelerate the slide downhill. And yet, there is an even more striking, and more ominous feature. On each of the matters that became the object of constitutional amendments, the

Supreme Court had held that extending reservations to that sphere or level or extent – to promotions; to giving ‘consequential seniority’ in addition; to diluting standards; to private unaided educational institutions -would violate the basic structure, that it would be most injurious to the national interest. It had held this in the most explicit terms. The politicians have just put new words in the Constitution. The same court has then held the same measure to be constitutional. There have been brave dissent – that of Justice Kuldeep Singh in *Indra Sawhney*; that of Justice N.M. Kasliwal in *St Stephen’s College*; that of Justice Dalveer Bhandari in *Ashoka Kumar Thakur*. And I have little doubt that these are the ones that will be vindicated by time. But as of today, they stand out as much for their prescience and cogency as for the fact that they are the exceptions. Most judges in the court have acquiesced in the new provisions. A regrettably large number have embraced the new provisions, and waxed eloquent about the boons that would now flow for the country from the very measure that, just the other day, the same court had said would injure the country no end. These are the judges who have prevailed.

The result has been dismal. Where judges have tried to insert a splinter in the dyke to keep the flood out, politicians have yanked it out with a new amendment. Where the word of the politicians would have carried no weight, the judges have stepped forth and provided the rationalization and legitimacy.

How has the Supreme Court of all institutions become a handmaiden in this descent? To begin with we have to bear in mind two basic, non-judicial facts, so to say:

- In our system, judges are chosen – at all level – by the executive which, in turn, is chosen from within legislatures; hence, the nature of the legislators comes to colour the judiciary as much as, say, the civil services.
- As we have seen throughout this study, judges are affected by the climate of discourse as much as any other group. And this climate has been, it continues to be dominated by leftist populism.

There are two further features that pertain to the judiciary itself:

- For decades on end, the direction in which jurisprudence proceeds is set by just half a dozen judges; the rest rush along that path.
- Among judges, as in the intellectual class as a whole, the ‘progressives’ have been audacious and full of certainties; the liberals have been meek and reticent.

As we have seen, each of the amendments had been specifically and explicitly designed to overturn judgments of the Supreme Court, or, as in the case of the seventy-seventh amendment, to take advantage of a judgment; each which had been specifically and explicitly designed to do precisely that which the Supreme Court had held time and again would be a violation of the Basic Structure of the Constitution. Yet, *each of these amendments has been upheld by the Supreme Court* in the cases that followed.

By what steps, on what reasoning did the Supreme Court anoint as constitutional what just the other day it had held to be wholly unconstitutional?

But before I get to that, I must, with intense regret, record a mea culpa. Of the five amendments that I have listed above – numbers 77, 81, 82, 85 and 93 – three – 81, 82, 85 – were passed when I was a member of the ruling alliance, and of the government. Given what I had written against reservation – for instance, at the time that a frightened V.P. Singh had rammed Mandal down everyone’s throat – it would be no surprise that I was wholly opposed to each of these amendments, and, given that public record, I do not break any official secret when I say that I opposed them to the higher-ups when the amendments came up for consideration within government. To no avail.

The inexcusable thing occurred next. When the time came to vote on the amendments in Parliament, those infernal three-line party whips had been issued. I went along and meekly voted for the amendments, scarcely able to look up from the console that housed the buttons. The sole exception in the Rajya Sabha was the well-known dramatist, writer and public intellectual, Cho Ramaswamy. Indeed, he was the sole exception in both the Lok Sabha and the Rajya Sabha taken together. He alone stood up to all the others and voted against the amendment – it was the one concerning promotions and consequential seniority. He did not just vote against the amendment, he got

up in the face of the entire House and spoke against the new provision. Many members went up to him afterwards and told him that he had done the right thing, that they wished they too could have opposed the amendment.

That day he spoke for the country. I had gone along and done an unconscionable wrong.

The judges' response

First and foremost, being judges, they seem free to declare or cite or invoke or take note of whatever suits the thesis of the moment, and shut eyes to or glide past or reject outright the very same thing when it doesn't. When that is what will serve the decision, long perorations are delivered on 'the general principle' underlying a specific provision – we shall encounter this approach at some length in a moment. When these do not fit the decision exactly, they declare, 'We have to go by what the Constitution framers intended originally and not by general concepts or principles.'¹ And this from a bench and in a case in which the judges were pushing the outcome farther and farther away from what the framers had intended.

When it is put to them that, by abolishing privy purses, the government was going back on the assurances that Sardar Patel had given to the princes, they say, 'The Court is not concerned with the issue of morality while dealing with the validity of an Amendment.'² When the plain text of the Constitution is an obstruction, the judges declare: 'Constitutional adjudication is like no other decision-making. There is a moral dimension to every major constitutional case; the language of the text is not necessarily a controlling factor. Our Constitution works because of its generalities; and because of the good sense of the judges when interpreting it. It is that informed freedom of action of the judges that helps to preserve and protect our basic document of governance ...'³

But when the specific provision rather than some general principle is what will buttress the decision – we shall encounter the words 'of their choice' of Article 30 as an example in a moment – the judges decide to insist on the literal words.

At one turn, we learn that the Constituent Assembly debates are important in interpreting what the Constitution says and what its founders

had in mind – and at such turns anything said even by a member who was otherwise no great authority turns out to be of high significance. At another turn, we learn that the relevance of the Constituent Assembly debates in understanding the provisions of the Constitution is doubtful, that the provisions have to be read by themselves. What goes for the debates of the Constituent Assembly as a whole, goes a fortiori for what, say, Ambedkar said while piloting some provision. He is invoked as the authority to describe the plight and exploitation of the Scheduled Castes, and to assert that these have to be recompensed. But his figure of reservations being kept around 30 per cent; his admonition that the exception must not swallow the rule; his apprehension that reservations could well lead others to think poorly of those who had entered government services through them – why, these are to be left to the dissenting opinions!

‘Yes, there are many American Indians in our Court,’ said a progressive judge making light of the submission of a senior counsel as he cited an earlier judgment of our Supreme Court that had invoked with approval what had been held by the US Supreme Court. What the US courts have said has little relevance to our situation and jurisprudence, many a judge says, we have our own Constitution. Yet, when what the US Supreme Court has held is convenient, it is invoked. Not just that, even articles and lectures by US judges, writings even of American scholars are invoked – from Bork on the one end to Stiglitz on the other, the latter supplemented by sundry books against liberalization-privatization-globalization.⁴

Constitutional adjudication is a very delicate and complex task, they say, and are quick to invoke Justice Holmes – as they did in *Saurabh Chaudri*. In that case, they appropriated flexibility thus:

Constitutional interpretation is a difficult task. Its concept varies from statute to statute, fact to fact, situation to situation and subject-matter to subject-matter. Perceptions are yet to be perceived by the court which would meet all situations while laying down emphasis for achieving excellence in all spheres of life keeping in view Chapter IV-A of the Constitution of India which provides for fundamental duties, circumstances and compulsions faced by the State in this behalf led the courts to uphold a statute providing for reservation for a special class of people. Mostly they suffer from disability either of belonging to an oppressed community or by way of economical, cultural or social imbalances. The courts shall all along strive hard for maintaining a balance. While interpreting the Constitution, we must notice the following view of Justice Holmes expressed in *Missouri v. Holland* [252 US 416 : 64 L Ed 641 (1919)] [US at p. (433)]:

[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. *The case before us must be considered in the light of our whole experience, and not merely in that of what was said a hundred years ago.*

Equally important is an elucidation of Justice Frankfurter contained in the article ‘Some Reflections on the Reading of Statutes’. This court also in *Jagdish Saran (Dr) v. Union of India* [(1980) 2 SCC 768 : AIR 1980 SC 820], a decision which is applicable in the fact situation of this case, stated the law thus (SCC p. 772, para 7):

Law, constitutional law, is not an omnipotent abstraction or distant idealization but a principled, yet pragmatic, value-laden and result-oriented, set of propositions applicable to and conditioned by a concrete stage of social development of the nation and aspirational imperatives of the people. *India Today* – that is the inarticulate major premise of our constitutional law and life.⁵

Notice the readiness with which American judges are being invoked – in this instance because they help appropriate flexibility! In any event, this being what these authorities have taught, ‘flexibility’ becomes a ‘doctrine’:

The constitutional requirement for judging the question of reasonableness and fairness on the part of the statutory authority must be considered having regard to the factual matrix obtaining in each case. It cannot be put in a straitjacket formula. It must be considered keeping in view the *doctrine of flexibility*. Before an action is struck down, the court must be satisfied that a case has been made out for exercise of power of judicial review. We are not unmindful of the development of the law that from the doctrine of *Wednesbury* unreasonableness, the court is leaning towards the doctrine of proportionality. But in a case of this nature, the doctrine of proportionality must also be applied having regard to the purport and object for which the Act was enacted.⁶

On the other hand, when sticking to the text is what will advance the judgment, they become strict constructionists. Some of the most conspicuous instances of this can be found in judgments relating to Article 30, the article that deals with the ‘right of minorities to establish and administer educational institutions’. The country had been partitioned on the cry that Muslims will never be secure in a united India. The framers

were naturally keen to reassure the minorities that they would be free to preserve their religion, language and culture. Accordingly, Article 29 was enacted guaranteeing them and assuring them of this freedom. In case they wanted to set up institutions for safeguarding their language, culture, religion, Article 30 was enacted assuring them that ‘All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.’ The context made the purpose clear: minorities would have the freedom to set up such institutions as they thought would best preserve their culture, religion, language. But, given what has been the climate of discourse since the framing of the Constitution, the judges became literalists. Minorities would have the right to set up and manage ‘educational institutions of their choice’ irrespective of the purpose for which the institution was set up. Thus, engineering colleges and dental colleges set up by a family of, say, Muslims would have freedoms from state regulation and oversight that engineering and dental colleges set up by run-of-the-mill Indians would not.

Now, these are not stray phrases thrown in to light up a purple passage. They are stances, they are standpoints that indicate the direction in which that judgment will go, they are signposts which tell us where the reasoning being advanced in the text will eventually end.

Such formulations have a significance beyond the particular judgment in which they figure. Succeeding benches can strike the same pose and gallop further in the same direction.

A special felicity

The next thing that strikes one is the felicity with which judges are able to ‘distinguish’ the case that they are considering from an earlier one in which the judgment has set a precedent they do not want to follow in the case at hand. There shouldn’t be any reservations in postgraduate courses in medical institutions for candidates from within these institutions, the courts have held. It is imperative that high standards be maintained as the graduates of these courses will be handling complex problems in health and medicine affecting the lives of large numbers, and also because the best from all over the country must have access to the few institutions of higher medical education that exist in the country. But the scheme at hand is not

one of keeping reservations for graduates of the same institution. It is one of just giving *preference* to them.⁷ Keeping aside 50 per cent seats for candidates from within the service in one case, keeping aside 20 per cent in another is valid as these are schemes ‘more in the nature of *classification rather than reservation* as understood in the context of backward classes’. All that is being done is that the state is choosing the source, a channel from which it shall make admissions.⁸

Next, recall the many instances in which the Supreme Court has taken matters into its own hands, and initiated action *suo moto*. Recall its reach as well as its grasp in *Vineet Narain* and in the 2G rulings. But equally often, when the matter cries out for it to examine the facts, we see the court just abdicate. To take an instance from a case that will figure in our discussion later, even though the court was specifically seized of the ninety-third amendment – which provided that governments shall have the authority to decree reservations in private educational institutions even if they do not receive any aid from the state – the court refused to consider the rights of such institutions on the ground that no unaided private educational institution had come before it to challenge the amendment.⁹

One of the favoured devices for not looking at the obvious – we shall encounter it soon – is to shift the matter to an indefinite future: we will examine whether power has been abused when the occasion arises, the Supreme Court says as we shall soon see, in a case such as *M. Nagaraj*; the aggrieved can come to us at that stage.

Weighing the heart

When confronted with the question about what the reservations that have been decreed will do to the fate of candidates who manifestly have greater merit to commend them, the courts have just pooh-poohed merit. We have come across several examples of this in the study earlier. Hence, just one or two instances will be enough to remind us of the easy logic with which our courts dispose of what they find inconvenient. Medical practitioners will be handling life-and-death issues. Ordinary people will be at their mercy. Hence, they must be proficient. All this is emphasized often – in general terms. And just as often dismissed with disdain. ‘Social concern is more

relevant than peak performance in freak cases,’ Justice Krishna Iyer declaimed in *Jagdish Saran* – high marks are just ‘peak performance’; the instances in which these are attained are ‘freak cases’! And the remark was invoked with acclamation and built upon in a case that we shall soon encounter in another context also, *Pradeep Jain*. The heart is more important than marks, the Supreme Court held as if one has necessarily to be absent where the other is present:

But let us understand what we mean when we say that selection for admission to medical colleges must be based on merit. What is merit which must govern the process of selection? It undoubtedly consists of a high degree of intelligence coupled with a keen and incisive mind, sound knowledge of the basic subjects and infinite capacity for hard work, but that is not enough; it also calls for a sense of social commitment and dedication to the cause of the poor. We agree with Krishna Iyer, J., when he says in *Jagdish Saran case* [(1980) 2 SCC 768 : AIR 1980 SC 820 : (1980) 2 SCR 831] : (SCC p. 778, para 21)

‘If potential for rural service or aptitude for rendering medical attention among backward people is a criterion of merit – and it, undoubtedly, is in a land of sickness and misery, neglect and penury, wails and tear – then, surely, belonging to a university catering to a deprived region is a plus point of merit. Excellence is composite and the heart and its sensitivity are as precious in the scale of educational values as the head and its creativity and social medicine for the common people is more relevant than peak performance in freak cases.’

Of course, the judge did not disclose how the heart may be assessed. Perhaps that explains the verbal acknowledgement in the paragraph of *Pradeep Jain* that follows the quotation from Justice Krishna Iyer:

Merit cannot be measured in terms of marks alone, but human sympathies are equally important. The heart is as much a factor as the head in assessing the social value of a member of the medical profession. This is also an aspect which may, to the limited extent possible, be borne in mind while determining merit for selection of candidates for admission to medical colleges though concededly it would not be easy to do so, since it is a factor which is extremely difficult to judge and not easily susceptible to evaluation.¹⁰

Remember that the same court has frowned upon attaching much significance to viva voce in the final scores by which a candidate has to be assessed. In a word, interviews are unreliable, but the heart quotient can be weighed!

The imperative that merit must be central to education in general, and not just to medical education, is often extolled in general terms. And, in

echoes of *Jagdish Saran* and *Pradeep Jain*, just as often brushed aside in specifics. *Saurabh Chaudhri v. Union of India* is typical in this regard. That merit must form the basis is acknowledged, and just as soon talked out. Here is how the Supreme Court deals with it:

The third question that arises for our consideration is, whether the reservation by institutional preference is valid. India is one country and all its citizens should be treated equally. The essence of equality is enshrined in Article 14 of the Constitution of India. But does it mean that the equality clause must be applied to all citizens in all situations? It is true that the country should strive to achieve a goal of excellence which in turn would mean that meritorious students should not be denied the pursuit of higher studies. This itself brings us to the question, *who is to judge the merit and what are the standards therefor? It is extremely difficult to lay down a foolproof criterion. Success or failure of a candidate in one examination or the other may not lead to an infallible conclusion as regards the merit of a candidate so as to achieve excellence.* The larger question, therefore, would be how and to what extent balance should be struck? The ideal situation, although it might have been to see that only meritorious students irrespective of caste, creed, sex, place of birth, domicile/residence are treated equally but history is replete with situations to show that India is not ready therefor. Sociological conditions prevailing in India compelled the makers of the Constitution to bring in Articles 15 and 16 in the Constitution. The said articles for all intent and purport are species of Article 14 which is the genus in a sense that they provide for exception to the equality clause also. Preference to a class of persons whether based on caste, creed, religion, place of birth, domicile or residence is embedded in our constitutional scheme. Whereas larger interest of the country must be perceived, the lawmakers cannot shut their eyes to the local needs also. Such local needs must receive due consideration keeping in view the duties of the State contained in Articles 41 and 47 of the Constitution of India.¹¹

Who is to do it?

The same pattern is repeated when the responsibilities of the state are in question. We get ringing declarations that when a law is challenged, the burden of proof shall be on the state; the mere assertion by it that it has taken all factors into account will not be enough. In *State of Andhra Pradesh v. A.P. Sagar*, the Supreme Court declared:

Article 15 guarantees by the first clause a Fundamental Right of far-reaching importance to the public generally. Within certain defined limits an exception has been engrafted upon the guarantee of the freedom in Clause (1), but being in the nature of an exception, *the conditions which justify departure must be strictly shown to exist.* When a dispute is raised before a court that a particular law which is inconsistent with the guarantee against discrimination is valid on the plea that it is permitted under Clause (4) of Article 15 *the assertion by the State that the officers of the State*

had taken into consideration the criteria which had been adopted by the courts for determining who the socially and educationally backward classes of the society are, or that the authorities had acted in good faith in determining the socially and educationally backward classes of citizens, would not be sufficient to sustain the validity of the claim. The courts of the country are invested with the power to determine the validity of the law which infringes the Fundamental Rights of citizens and others and *when a question arises whether a law which prima facie infringes a guaranteed Fundamental Right is within an exception, the validity of that law has to be determined by the courts on materials placed before them. By merely asserting that law was made after full consideration of the relevant evidence and criteria which have a bearing thereon, and was within the exception, the jurisdiction of the courts to determine whether by making the law a Fundamental Right has been infringed is not excluded.*¹²

And this is cited with approval by none other than the then Chief Justice K.G. Balakrishnan in *Ashoka Kumar Thakur v. Union of India*.¹³ Had the state produced the requisite facts before the court? Or, indeed, outside the court? Were the facts available at all? In that very case Justices Arijit Pasayat and C.K. Thakker pointed out that, far from individual classes/castes being identified as being backward on the basis of specified criteria, even their number was not known and yet reservations had been decreed in their favour. The judges noted, Concrete data about the number of backward classes in the country does not appear to be available. The survey conducted by the National Sample Survey reveals that the percentage is not 52% as is highlighted by the respondents.’ They recalled that the Backward Classes Act specifically requires the Central government to determine the backward classes for whom the statute is intended. ‘Undisputedly, such determination has not been done,’ they wrote. ‘The plea is that for more than half a century enough attention has not been given for the benefit of Other Backward Classes in the matter of admissions to higher educational institutions. That cannot be a ground to act with hurry and with undetermined data,’ the judges recorded. ‘It may be as rightly contended by learned counsel for the respondents that the percentage can certainly not be less than 27%. But that is no answer to the important question as to the identity test ...’ The Backward Classes Commission was to identify the Backward Classes. All that it had done was to act on applications for inclusion or exclusion that came to it. This is not what the Supreme Court had in mind when it had recommended that such a commission be set up, the judges held.¹⁴

Justice Dalveer Bhandari, of course, went further, and nailed the utter perversity in what was being done. As the census does not count them, no one knows what percentage of the population falls into ‘Other Backward Classes’, and yet the government has decreed 27 per cent reservations for them in universities, he noted. Practically since the country became independent, the government has deliberately not taken a caste-based census, he noted, and for good reason: ‘Taking an OBC census is horrifying,’ the judge observed, ‘because it encourages the Government to enact a policy on the basis of caste.’ An approach of this kind is prohibited by the Constitution. It is something that would deepen the caste divide in the country. ‘If the Central Government have consistently rejected an OBC census because it would promote casteism, how can this Central Government make reservations on the same ground?’ he inquired.¹⁵

And what was Justice K.G. Balakrishnan’s response? Presiding as Chief Justice over the same court that had held that the state must establish its claims with evidence, that mere assertions won’t do, the judge approved what the government and Parliament had done on the ground that ‘Parliament is invested with the power of legislation and *must be deemed to have taken into consideration all relevant circumstances when passing a legislation of this nature. It is futile to contend whether Parliament was not aware of the statistical details of the population of this country and, therefore, 27% reservation provided in the Act is not illegal nor on that account, can the Act itself be struck down.*’ He maintained that the 27 per cent reservation for Backward Classes was ‘based on the detailed facts available with Parliament. Various commissions have been in operation determining as to who shall form SEBCs [socially and economically backward classes]. Though a caste wise census is not available, several other data and statistics are available’ – of course, he did not specify which these were. And his take on what the *Indra Sawhney* judgment had concluded about the data used in the Mandal report was of a kind: ‘In *Indra Sawhney* the Mandal Commission was *accepted in principle though the details and findings of the Commission were not fully accepted by this Court.* 27% of reservation in the matter of employment was accepted by this Court.’ Ergo, the empirical basis of that recommendation was accepted! Ergo, that empirical basis was sound!

As for burden of proof, the judge stood what the court had held on its head. “*The petitioners* have not produced any documents to show that the backward class citizens are less than 27% vis-à-vis the total population of this country,’ he ruled, ‘or that there was no requirement of 27% reservation for them!’¹⁶ The government was to produce the data. The petitioners were blamed for not producing it!

We shall see the same sequence being played out in regard to the all-important consideration – efficiency of administration – when we turn to the case that is the one most frequently cited these days, *M. Nagaraj v. Union of India*.¹⁷ The limit has been reached in the stay that has been granted by the Supreme Court on the judgments of the Andhra Pradesh High Court which had struck down reservations for Muslims qua Muslims. In those cases, as we have seen, the high court had held the decisions of the state government to be wholly unconstitutional. It had held them to be wholly unconstitutional not once but *thrice*. And one of the reasons on account of which it had done so – a reason it had documented in detail – was that the state had neither identified nor quantified the beneficiaries, that the ostensible exercises that had been carried out to do so were farces of the first order. The bench headed by Chief Justice Balakrishnan, the same Balakrishnan who had declared that the state had to identify the criteria for assessing the three constitutional parameters within which alone reservations could be given – inadequate representation, backwardness and effect on administrative efficiency – and to quantify them, stayed the judgments!

An imperative reduced to a nullity

By the same sorry sequence of ringing declamations followed by abdication, Article 335 – which mandates that in taking measures to help the Scheduled Castes and Tribes governments must bear in mind the effect these shall have on administrative efficiency – has been reduced to a nullity. Almost to a pattern, the court has delivered itself of ringing statements of ‘principle’, and then just endorsed what the executive has done. Ever so often, the courts have waxed eloquent on how governmental services must reach the common people, in particular the poor; and how scarcely any service that the state machinery provides is as important as services

affecting the health of the common people; and, therefore, how the state must ensure that these are provided efficiently: no one suffers more than the poor when these are not made available in sufficient magnitude and up to high standard – the rich, after all, can avail of expensive private hospitals and doctors. But what happens in specific cases can be gleaned from what the Supreme Court held in, say, *State of Punjab v. Manjit Singh*.¹⁸ The Punjab Public Service Commission took the stand that for medical service – whose members have to deal with the health and life of the people at large – candidates must come up to some minimum standards, and that it is the duty of the Commission to ensure that these standards are maintained. For this reason, the Commission prescribed that the cut-off marks for the general candidates must be a minimum of 45 per cent, and for Scheduled Caste candidates they must be 40 per cent – not a high bar by any standard: the cut-off marks for entering even middling colleges in Delhi are well above 90 per cent.

‘We feel, here lies the fallacy in the whole reasoning of the Commission,’ the Supreme Court held, rejecting the plea of the Commission. ‘It is no doubt true that the Commission is an independent and autonomous body and has to work without influence of any authority or the Government,’ the court said. ‘It is rather under duty to act independently. But at the same time the fact cannot be lost sight of that the State Government is competent to lay down the qualifications for different posts, and frame rules for the purpose or take policy decisions which may of course not be against the law’ In fact, the court said, citing Article 320(4) of the Constitution, the government was not required to even consult the Public Service Commission ‘as respects the manner in which any provision referred to in clause (4) of Article 16 or as respects the manner in which effect may be given to the provisions of Article 335’.

Reading the most capacious latitude into this provision, the court held that ‘Where no special qualification or any prescribed standard of efficiency over and above the eligibility criteria is provided by the Rules or the State, it would not be for the Commission to impose any extra qualification/standard supposedly for maintaining minimum efficiency which, it thinks, may be necessary. No consultation with the Commission, in such matters, is envisaged in view of clause (4) of Article 320 of the

Constitution.’ Indeed, for the purpose of shortlisting candidates, ‘it would not at all be necessary to provide cut-off marks ...’¹⁹

Five years later, in *Union of India v. Pushpa Rani*, the Supreme Court took self-denial to ascetic levels! In heaps of cases, the courts have gone into the minutest minutiae of appointments, promotions, qualifications, and the rest in regard to governmental services. In *Pushpa Rani*, on the other hand, the Supreme Court delivered itself of the following:

Before parting with this aspect of the case, we consider it necessary to reiterate the settled legal position that matters relating to creation and abolition of posts, formation and structuring/restructuring of cadres, prescribing the source/mode of recruitment and qualifications, criteria of selection, evaluation of service records of the employees fall within the exclusive domain of the employer. *What steps should be taken for improving efficiency of the administration is also the preserve of the employer. The power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provision or is patently arbitrary or is vitiated due to mala fides. The court cannot sit in appeal over the judgment of the employer and ordain that a particular post be filled by direct recruitment or promotion or by transfer. The court has no role in determining the methodology of recruitment or laying down the criteria of selection. It is also not open to the court to make comparative evaluation of the merit of the candidates. The court cannot suggest the manner in which the employer should structure or restructure the cadres for the purpose of improving efficiency of administration.*

It lamented the fact that, while governments had been taking steps to bring about ‘real equality’ in education and governmental services, they had been continually thwarted:

However, implementation and execution of such action have continuously faced roadblocks at several stages. Those who had been benefited by the existing system cried foul and created the bogey of violation of their legal and constitutional rights. Almost all the actions taken by the State and its agencies for ameliorating the conditions of have-nots of the society by providing reservation were subjected to periodical judicial scrutiny. By and large, the courts approved the affirmative actions of the State but on some occasions the policy of reservation or implementation thereof was found to be faulty and actions taken by the Government have been nullified or sliced by judicial intervention.

To settle the matter, it quoted with approval what the Supreme Court had said earlier in *State of Punjab v. Hira Lal*:

... The reservation must be only for the purpose of giving adequate representation in the services to the Scheduled Castes, Scheduled Tribes and Backward Classes. The exception provided in Article 16(4) should not make the rule embodied in Article 16(1) meaningless. *But the burden of establishing that a particular reservation made by the State is offensive to Article 16(1) is on the person who takes the plea.* The mere fact that the reservation made may give extensive benefits to some of the persons who have the benefit of the reservation does not by itself make the reservation bad.... It is true that every reservation under Article 16(4) does introduce an element of discrimination particularly when the question of promotion arises. *It is an inevitable consequence of any reservation of -posts that junior officers are allowed to take a march over their seniors. This circumstance is bound to displease the senior officers. It may also be that some of them will get frustrated but then the Constitution makers have thought fit in the interests of the society as a whole that the backward class of citizens of this country should be afforded certain protection.*²⁰

As for the argument that arose directly from *M. Nagaraj*, namely that ‘the policy of reservation cannot be applied at the stage of making promotions because the Railway Administration had not produced any evidence to show that Scheduled Castes and Scheduled Tribes were not adequately represented in different cadres and that the efficiency of administration will not be jeopardized by reserving posts for Scheduled Castes and Scheduled Tribes,’ the court declined to consider it on the ground that it had not been put forward at earlier stages. The Railways had not, therefore, had an opportunity to rebut it.²¹ But in view of what the five-judge bench had said in *M. Nagaraj*, and the emphasis that it had laid on the imperative repeatedly, why could the argument not be examined now and the employers be given the opportunity to produce facts to the contrary? Had the court not said that if an excess was claimed, the court would examine the way the power had been exercised? Had it not said that it was for the state to quantify the three boundaries within which alone the benefits of reservations could be given – backwardness of the beneficiaries; inadequacy in the governmental service; and effect on the efficiency of administration?

Sumeet Malik, the editor of the compilation of Supreme Court judgments on educational institutions, gives another typical example. In his verdict on *Ashoka Kumar Thakur v. Union of India*, the then Chief Justice Balakrishnan was emphatic about excluding the creamy layer: without doing so, the backwards would not form a class; doing so is necessary for identifying who the backwards are; unless they are hived off, the

Fundamental Right to equality that is guaranteed by Articles 15(1) and 16(1) will be violated; he recapitulated the reasons that had been given in *Indra Sawhney* to this effect, and concluded, ‘all these reasonings [for excluding the creamy layer from reservations under Article 16(4)] are equally applicable to the reservation or any special action contemplated under Article 15(5).’ Accordingly, he rejected the apprehension that ‘if the “creamy layer” is excluded, there may be practically no representation for a particular backward class in educational institutions because the remaining members, namely, the non-creamy layer, may not have risen to the level or standard necessary to qualify to get admission even within the reserved quota.’ Just two paragraphs later, the same judge declared that, as there may not be a sufficient number of candidates to fill the seats that have been reserved even after the cut-off criteria have been relaxed ‘to some extent’, the government memorandum ‘need not be strictly followed’ and ‘the State can issue guidelines to effectuate the implementation of the reservation purposefully!’ The judge did not, of course, bother to explain how this would be done, or to what extent standards were to be slackened further.²²

Instances of this kind can be multiplied almost indefinitely. And it requires no imagination to see what a relief they are to an executive bent on pandering to – or feeling compelled to pander to – section after section. From the point of view of the executive, after all, you can give all the grandiloquent lectures you want, so long as you give it relief in the case at hand!

We will come across a much more consequential example of such empathy when we turn to the reigning judgment on service matters, *M. Nagaraj v. Union of India*. Here we need only note that the notion that ‘Merit is not a fixed absolute concept’ is institutionalized in practice! Relying on *Chattar Singh v. State of Rajasthan*,²³ in a 2009 case, the Supreme Court reiterates, first, that a Public Service Commission should calculate the number of vacancies that have arisen or are likely to arise; then, that it should prune the number of candidates who have appeared for the preliminary examination in such a way that around fifteen times the number of vacancies get to sit for the main examination. Next, it states, ‘The ultimate object is to get at least three candidates [per vacancy] or as is prescribed, who may be called for *viva voce*. Therefore, the lowest range of

aggregate marks as cut-off for general candidates should be so worked out as to get the required number of candidates including OBCs, Scheduled Castes and Scheduled Tribes. The lowest range would, therefore, be worked out in such a way that candidates numbering fifteen times the notified posts/vacancies would be secured so as to afford an opportunity to the candidates to compete in the Main Examination. Under the proviso, if that range has not been reached by the candidates belonging to the SCs or the STs, there may be 5% further cut-off from the last range worked out for the general candidates so as to declare them as qualified for appearing in the Main Examination.'²⁴ In a word, standards must continue to be lowered till the requisite number can be declared to be above them!

The malignancy in which they have acquiesced

Ever so often resounding perorations in a judgment are delivered on the very concept that is being undermined by the judgment – equality, efficiency in administration – and then on the specific matter that is before them, the court approves what the governments have done. The most egregious of these, and the most perilous has, of course, been the notion that continues to underlie all reservations schemes to this day – namely, caste.

As we see around us every day, and as we have noted earlier in this study, caste was being erased by modernization. Governments and legislators made caste the basic criterion on the basis of which groups were given reservations. Moreover, as we noted, it is not that some caste group was in an abject condition, that the eyes of the state fell upon it, and, therefore, it was anointed backward and accorded the benefit of reservations. On the contrary, precisely because a caste group had become powerful – because of its numbers and organization; and because it had learnt that intimidation and militancy pay – that governments and legislators conceded reservations to it. Think Lingayats and Vokkaligas in Karnataka. Think Jats in Rajasthan. It is no secret that because of this ruinous sequence, in spite of all-round progress, the number of backward castes, as well as the numbers who claim themselves to be backward have continued to grow. Caste – the bane of our society – which was getting eroded, has become more deeply entrenched.

Courts do not have to pander to any group. So, it is but natural that many have looked to them to halt this lethal drift. But what has happened in fact? Those among the judges who have internalized that diabolic rationalization of opportunism – ‘In India, caste-is-class’ – have passionately cast their judgments to push that premise farther. The others see that the direction in which the country has been pushed by caste being taken as the basis of state policy will spell ruin for our country and society. But, the peroration or lament delivered, they have acquiesced in what governments and legislatures are doing. At best, they have deferred corrective action to the indefinite future.

The sequence as well as its consequence can be illustrated with a dozen examples. One judgment – and it is one of the most significant judgments on reservations in educational institution – will suffice.

As we have seen, the ninety-third amendment was enacted in 2005. Through it, Article 15(5) was inserted. This new clause in the Article provides that private educational institutions also will have to provide the reservations that are decreed – even if they do not receive or avail of any aid from the state. This is the amendment which came up for challenge in *Ashoka Kumar Thakur v. Union of India*.²⁵ A bench of five judges delivered four judgments. With the sole exception of Justice K.G. Balakrishnan, all of them stressed that continuing to use reservations indefinitely as the weapon of choice in the policy of affirmative action will itself have deleterious consequences and that continuing to use caste as the basis for reservations would have severe ill effects for the country.

Justice Balakrishnan repeated the standard clichés about caste that we have encountered earlier. He accepted at face value the conclusions of ‘various commissions’ that had considered requests for being included in the list of backwards. He agreed that the creamy layer must be excluded from the reservations that are decreed for backward classe – but most emphatically *not* from those that have been set aside for Scheduled Castes and Tribes! He maintained that the fact that the amendment and the resulting orders of government had not set any time limit to reservations did not mean that they were unconstitutional – the question of continuing these benefits to Other Backward Classes ‘could be examined by Parliament at a future time’.²⁶

The others were of the opposite view in regard to caste as a basis for reservations, as they were in regard to the indefinite continuance of and reliance on reservations. The immediate effect of caste-based reservations has been unfortunate, Justice Raveendran wrote. After caste-based reservation was introduced, groups have been straining to acquire the 'backward tag', he pointed out. 'When more and more people aspire for "backwardness" instead of "forwardness" the country itself stagnates,' he wrote. Reservations are needed only for a limited period. If there is no review and reservations are continued, 'the country will become a caste divided society permanently,' he warned. 'Instead of developing a united society with diversity, we will end up as a fractured society forever suspicious of each other.' Reservations can be a 'temporary crutch', he pointed out. But care has to be taken that the road to equality through 'affirmative discrimination' does not become a rut, he stressed.²⁷ Justices Pasayat and Thakker stressed that caste was to be used only in the beginning for identifying backward classes. But, in the long run, a classification based on caste has a tendency of inherently becoming pernicious, they wrote. By now reservations are being provided for what are in effect castes without even knowing what their numbers are. It is poverty on which state policy must focus for it is from poverty that other ill – deprivation, social discrimination, backwardness in general – flow. And 'Poverty knows no caste'... That no group has graduated to being excluded from the list of Other Backward Classes, they wrote, 'raises doubt about the real concern to remove inequality'. Unless the *economically* backward are also included in schemes of empowerment we may end up with 'a catastrophe of collapse because of something which the Constitution wants to obliterate', they warned. In a word, while caste may be used as a 'beginning point for identifying the beneficiaries of reservations, policy must move to basing the criteria on occupations, on social acceptability and on a means test 'since poverty is the prime cause of all backwardness as it generates social and educational backwardness.' That after applying the policy for six long decades, the number of backwards is continuing to increase itself establishes that 'the need for its continuance warrants deliberation.' They reproduced figures that showed the woeful condition in

which our schools were functioning. It is this dismal quality to which the state needs to attend ...²⁸

Justice Dalveer Bhandari was the most emphatic in his warnings against the use of caste as a criterion. He wrote that the use of caste to identify Other Backward Classes runs foul of the casteless and classless society that our Constitution envisages, that, in addition, it violates secularism. He traced the successive compromises -starting with the very first amendment to the Constitution – that had solidified caste, and he punctured the rationalizations that had been used to explain away these compromises. He pinpointed the harm that caste-based reservations would do to the supposed beneficiaries of reservations themselves – to their self-esteem as much as by the effect that the reservations shall have on the way others will come to look upon them. The Central government has consistently rejected a caste-based census as it would fan casteism, he pointed out. How then can it base the policy of reservations on caste? Caste has worn out, he pointed out. Status is now determined by the income one earns, the assets one has. Hence, exclusively economic criteria ought to be used for as the basis for the policy of reservations.²⁹

Who could ask for clearer enunciations? But in the end, what happened? Justice Balakrishnan recommended that there should be a review every ten years in regard to Other Backward Classes. Justices Pasayat and Thakker recommended that the statute be restricted to ten years, and that reservations under it be reviewed every five years. Justice Raveendran recommended periodic reviews. Justice Bhandari alone laid out the conclusions that flowed ineluctably from the apprehensions that each of the judges had recorded in regard to caste-based reservations. So as to achieve a casteless society, after ten years economic criteria alone should be used, he wrote. Parliament will not put a time limit to caste-based reservations or put an end to them, he wrote. Only the judiciary can stop them. But we are at the moment bound by what was held in *Indra Sawhney*. Hence, he pointed to what a larger bench alone could do in the matter.

The net result? The amendment which was before the judges got ratified. Caste-based reservations spread to yet another arena – to not just private educational institutions but even to those private institutions which are not getting any aid from the state. More and more castes continue to strive for

getting and indeed manage to get anointed as ‘backward’. The larger bench is nowhere in sight.

And, once again, the significance of this duality between emphasizing the general principle and going along with the specific proposal at hand goes beyond the specific judgment. In the subsequent cases, ever so often, the judges base their presumption not on the perorations but on the fact that on the specific matter the earlier bench had approved what the government had done.

Don't look back!

Governments have another reason to merely act out the gestures of deference, and then go on doing what they want. Often the Supreme Court gives far-reaching, on occasion minatory orders. Governments know that the court seldom returns to the matter to ascertain whether its orders are being complied with. In the early 1980s, *The Indian Express* did a series that documented how undertrials had been rotting in jail – for periods longer, much longer than the sentences they would have to serve if they had been convicted. In its judgments on *Hussainara Khatoon*³⁰ and other cases, the Supreme Court gave far-reaching orders. To prevent the horrors from being repeated, it ordered, among other things, that a census of prisoners be done every two years. Is the census being done? Years later I undertook a similar exercise in regard to directions about wastage disposal in Delhi, and was embarrassed to see that the court as well as the concerned tribunals had just kept repeating their directions verbatim year after year for many years, and had never bothered to even glance at the reports that were being submitted on their directions by the governmental departments: for these reports, each and every one of them, stated clearly that the orders had *not* been complied with!³¹

By 2005, the way that medical examinations were being postponed, and the declaration of results was being withheld had become a scandal. And for the students who would miss the deadlines for filing applications for the next step in their education and careers, it had become a very costly scandal. Time schedules had been prescribed, but these were being routinely violated. This had two sorts of results: [1] meritorious students often missed getting admission; [2] 15 per cent of the seats in medical

colleges were to be given on the basis of an All-India exam; as the results of this exam were being delayed or withheld, the seats were getting reverted to the state quota.

The matter went to the Supreme Court. The court came down on the authorities in a strongly worded judgment, *Mridul Dhar v. Union of India*.³² It spoke of ‘the utter chaos and confusion’ that had resulted from ‘deliberate non-adherence’ to the prescribed time schedule. It expressed its ‘anguish’ at the state of affairs and at the injustice that meritorious students had to suffer as a consequence. It gave a series of directions. In particular, it set out a time schedule to which all medical education institutions and boards must adhere. It declared that ‘Heads of Boards would be personally responsible to ensure compliance.’ And it charged the chief secretaries and health secretaries of state governments to report compliance with the schedule to the Directorate General of Health Services and the Medical Council of India. It specified that ‘non-compliance would make them [the chief secretaries and health secretaries] liable for requisite penal consequences.’ It said that these reports must be submitted to the Directorate General of Health Services by 31 October every year, and ‘the recalcitrant states, particularly officers personally will have to face penal consequences for violation.’

Are the time schedules in fact being adhered to? Have the state governments been submitting these reports? Given the chaos that the Supreme Court had found, wouldn’t it have been prudent to set up some simple mechanism for ascertaining that the reports it had ordered are, in fact, being received, and checking up on what they reveal? At my request, *The Indian Express* files a request under the Right To Information Act with the Directorate General of Health Services for the simplest information in this regard. The DGHS gives an ambiguous reply. Yes, all state boards and governments have been supplying the required information; there have been no defaulters. But it also says ‘Some of the Medical/Dental Colleges are required to be sent one or sometimes 2 – 3 reminders to obtain the desired information [sic].’

The paper inquires, ‘Has the DGHS notified any time schedule to state boards/state governments to submit reports in regard to admissions giving details of admissions granted as per the prescribed All India Quota? If yes,

have all the states been submitting the reports to the DGHS? Provide the dates of receiving the said reports in the DGHS for every state year wise since 2005. Please provide the list of defaulters in this regard along with the action taken against the responsible officers.’ The Directorate sidesteps each part of the question systematically! It states in reply:

While sending final allotment list to various Medical/Dental Colleges, the Director/Dean/Principal of Medical/Dental Colleges are requested to send one copy of list of candidates to Dte. G.H.S. after recording date of joining or informations about non-reporting, as the case may be, against name of each candidate [sic]. *No specific date is prescribed for this activity.*

Notice that the question was about state governments and state boards. And whether deadlines had been prescribed. The Directorate glides away from the state governments and boards to the colleges. But it does reveal that ‘No specific date is prescribed for this activity.’ Is that what you would have inferred the Supreme Court required of the Directorate? The reply continues:

However, before start of 2nd round of Counseling (or 2nd extended round of Counseling), while compiling vacancy position these lists are also consulted. Upto the stage of 2nd round or extended 2nd round of Counseling such information is received for all Medical/Dental Colleges. *No record of date of receipt of final report is maintained by MIC* [the Medical Council of India].

Given the number of colleges, and given the variation in regulations from state to state, it would be a wonder if the Directorate can furnish any idea of the extent of compliance with the stern directives of the Supreme Court in *Mridul Dinar*. Yet, for the record, there are no defaulters. One reason for this exemplary record surely must be that neither is any specific date prescribed as a deadline. The other reason surely must be that no record is kept of the receipt of the final reports!

The Directorate was next asked about the steps that had been taken to institute a common entrance test, and what the status was of this project. The Directorate replied as follows:

The information may be provided by Ministry of Health and FW [Family Welfare] as the questions pertains [sic] to them. Directorate General of Health Services has not conducted any study. A copy of this letter is being sent to MoH&FW for reply.

The Directorate is a part of the ministry!

A month passes. Eventually *The Indian Express* receives a reply from the ministry. The Medical Council of India has decided to hold the common entrance exam, the reply says. No advice has been sought from the states, it says, as the Supreme Court had asked the Government of India to examine the modalities of holding such an examination. The exam will commence from 2013 – 14, it says. What has been done thus far? A committee has been set up by the Ministry of Health and Family Welfare under the Chairmanship of – hold your breath – ‘DGHS’ – the head of the very body that had shoved the questions to the ministry! – ‘to examine the modalities of implementation of NEET [National Eligibility and Entrance Test].’³³

Do such replies not reinforce the plea made earlier that, when courts give directions, they must also set up elementary reporting requirements? Such requirements would do both: they would keep governments on their toes, and they would inform the courts of the effects of their directions. Examples of this sort can be multiplied by the dozen. We shall come across the court bemoaning the fact that the debate on reservations is taking place in ‘an empirical vacuum’ when we turn to M. *Nagaraj*, and then not doing anything at all to ascertain the effect of its judgments and of the new constitutional amendments on the governance and on government employees. The most blatant case of benign neglect – left to me, I would say ‘malign neglect’ – surely has been in regard to the creamy layer. The court has used the sternest language to lay down that the creamy layer must be excluded. In cases such as those relating to UP, Bihar, Kerala it has learnt at first hand how the state governments were dodging its directions, and in those instances it has nailed them. But has it ever inquired, ‘How many or what proportion of the OBCs in a particular state who would otherwise have got the benefit of reservations have been excluded because of the norms that the state has adopted?’

A tutorial

In general, the judgments of our courts are long. On occasion, they are so long and so puzzling that even judges cannot make out what they mean. Consider first an example of a specific order of the Supreme Court.

As I mentioned at the beginning of this Epilogue, I had asked my friends Ashok Desai and Arvind Datar for lists of recent judgments that I just must read to bring myself up to date on points covered in this study. Among the judgments they had listed was *Abhay Nath v. University of Delhi*, a judgment delivered in 2009. On reading it I learnt that this judgment had to be delivered to ‘clarify what the court had held four years earlier in *Buddhi Prakash Sharma v. Union of India*. On reading *Buddhi Prakash*, I learnt that *that* judgment had to be delivered to ‘clarify’ what the Constitution bench of the Supreme Court had held in *Saurabh Chaudri v. Union of India* in 2003. *That* judgment, it turned out, had been necessitated by what the court had decreed in *Dinesh Kumar II*, as it is known, a judgment delivered in 1986. *Dinesh Kumar II* had to be delivered as the scheme which the court had prescribed the previous year in *Dinesh Kumar I* had led to some untenable situations. That scheme had been prescribed to ‘clarify’ what the same bench had actually meant by the judgment it had delivered in 1984 in *Pradeep Jain v. Union of India*. By now I needed a tutorial. So I turned to Arvind Datar. This is what I learnt from him

In the case of *Dr Pradeep Jain v. Union of India*,³⁴ the Supreme Court was concerned with the question of whether admissions to institutes of higher learning within a state could be confined to persons domiciled within that state. The Supreme Court, after considering various judgments, held that while residence-based reservation in higher educational institutions was not unconstitutional per se, it could be imposed only to a certain extent.

Without giving any particular reasons for how the judges arrived at these figures, they held that *in undergraduate courses* such as MBBS and BDS, the reservation for intra-state candidates should, in no event, exceed the outer limit of 70 per cent of the total number of open seats *after taking into account other kinds of reservations validly made*. In the case of *postgraduate seats*, the court held that since postgraduate education required even more specialized treatment and the best talent from the country must have access to the best institutions, it would not be desirable to have *any* reservations on a regional basis for students at the postgraduate level. However, it was willing to make a concession for students who were from the same institution or university. For these students, it held:

... a certain percentage of seats may in the present circumstances, be reserved on the basis of institutional preference in the sense that a student who has passed M.B.B.S. course from a medical college or university may be given preference for admission to the postgraduate course in the same medical colleges or university but such reservation on the basis of institutional preference should not in any event exceed 50 per cent of the *total number of open seats available for admission* to the post-graduate course.

The very next year, in *Dr Dinesh Kumar v. Motilal Nehru Medical College*,³⁵ the *Pradeep Jain* judgment had to be clarified by the same bench of three judges. The court held that there had been a ‘misreading’ of the judgment in *Pradeep Jain* by some state governments. The court’s judgment was only that *after excluding the reservations validly made*, from the remaining seats, a maximum of 70 per cent could be reserved for students resident in the state. Therefore, if, for instance, there were 100 seats, and 30 per cent were reserved for Scheduled Castes and Scheduled Tribes, then, out of the remaining seventy seats, a maximum of 70 per cent, i.e. forty-nine seats, could be reserved for students residing in that state. In other words, in this case, a minimum of twenty-one seats must be reserved for candidates who had succeeded in an all-India open competition.

This clarification led to a situation where the 30 per cent reserved for the all-India quota varied inversely with the percentage of reservation in each state. In states like Tamil Nadu and Karnataka where the percentage of reservation on other grounds was very high, the 30 per cent of the remaining seats amounted to a minuscule number. Therefore, in *Dr Dinesh Kumar (II) v. Motilal Nehru Medical College*³⁶ a proposal was put before the court by the Government of India to set an absolute minimum of 15 per cent of the *total seats available* as reserved for all-India students. The court considered various objections from the state governments and came to the conclusion that ‘not less than 25 per cent of the total number of seats, *without taking into account any reservations*, shall be made available’ for all-India students in admissions to the postgraduate courses. Similarly, the court fixed a limit of 15 per cent of the *total seats* for the undergraduate courses.³⁷ Notice that while *Pradeep Jain* had fixed limits only for how much could be reserved for intra-state candidates, in the two *Dinesh Kumar* orders the focus had shifted to what was the minimum to be reserved for all-India students.

In 2003, a Constitution bench of the Supreme Court, while hearing *Saurabh Chaudri v. Union of India*³⁸ found that despite the orders in *Pradeep Jain*, many states including Karnataka, Tamil Nadu, Goa and Punjab, were flouting the guidelines with impunity. The court considered various judgments rendered in this context from the time when *Pradeep Jain* was decided and subsequently modified in *Dinesh Kumar (II)*, and held that the situation from that date had changed considerably. The Constitution bench felt that it was better to revert to, in their words, ‘the original scheme as framed in *Dr Pradeep Jain’s* case ... in preference to *Dr Dinesh Kumar’s* case’.

The problem arose now from what the court understood *Pradeep Jain* to have originally held, and why it was necessary to modify it in *Dinesh Kumar’s* case. The court held that the subsequent decisions had ‘reduced’ the reservation to 25 per cent. The language of *Pradeep Jain* had been unequivocal – the judgment reserved 50 per cent of the seats in the postgraduate exam for all-India students out of the ‘total open seats available’. As had been clarified in *Dinesh Kumar (I)*, this would only mean 50 per cent of the non-reserved seats, and not 50 per cent of the total seats. This was not ‘reduced’ to 25 per cent by *Dinesh Kumar (II)*. On the contrary, it was increased to 25 per cent of the total number of seats, since it was found that in states where the reservations for SC/ST and socially and educationally backward classes was very high, 50 per cent of the open seats amounted to a very small number.

Therefore, when the Constitution bench said that it would revert to the position in *Pradeep Jain*, and held that ‘Reservation by way of institutional preference, therefore, should be confined to 50 per cent of the seats since it is in public interest,’ whether this 50 per cent was to be 50 per cent of the total number of seats or 50 per cent of the non-reserved seats remained unclear.

Naturally, the matter landed up again with the Supreme Court for another ‘clarification’! The result was its judgment in *Buddhi Prakash Sharma v. Union of India*.³⁹ In this judgment, the Supreme Court held that the intention of the judges in *Saurabh Chaudri* had been to increase the reservation from 25 per cent to 50 per cent and not reduce it. Therefore, 50 per cent of the *total number of seats* was to be reserved for students from

the all-India quota. In effect, while being ‘clarified’ by a smaller bench in *Buddhi Prakash*, the decision of a Constitution bench in *Saurabh Chaudhri*, has been changed substantially.

And so another bout ensued. In *Abhay Nath v. University of Delhi*,⁴⁰ the Government of India sought a clarification of the order in *Buddhi Prakash Sharma* to the effect that within the 50 per cent of seats reserved for the all-India quota, 22.5 per cent (i.e. 11.25 per cent of the total) be reserved for SC/ST students. The Supreme Court in an abstruse sentence stated that the 50 per cent of the seats filled up by the all-India entrance examination ‘shall include the reservation to be provided for SC/ST students’.

To begin with, Arvind Datar first had me read paragraphs 6 and 7 of *Abhay Nath* again.⁴¹ And then he showed me that there are two typographical mistakes in that order that, if followed, would turn the position that was presented on its head! In paragraph 6, the words ‘if 22.5 per cent are reserved for SC/ST students’ must read as ‘if 22.5 per cent are *not* reserved for SC/ST students’ since the sentence will be internally inconsistent otherwise. And in paragraph 7, the words ‘to the effect that 50% of the seats for all-India quota shall *exclude* the reservation’, must read as ‘to the effect that 50% of the seats for all-India quota shall *include* the reservation’.

There is the other aspect. A three-judge bench of the Supreme Court, in effect, has modified the order made in a judgment delivered by a Constitution bench of five judges. Further, the court has reviewed its own order years after it was made, in a different proceeding. The review has been called a clarification.

This is but an illustration of a trend in our constitutional jurisprudence. A judgment of five judges is ‘clarified’ by a bench of three judges! For the Supreme Court, clarification, modification, alteration and variation have all become synonyms.

From this sequence, five points need to be borne in mind for what follows:

- The judgments were written in such a way that they repeatedly required to be ‘clarified’.

- In each round, the focus became just the percentage – whether these shall be X per cent or Y per cent; whether the X or Y shall apply to the total number of seats or to the number of seats that are left after ‘reservations validly made’, etc.
- At no stage was any attention paid, at no stage did the court feel it necessary to pay any attention to the effect that the percentages it was specifying shall have on the quality of medical education, and subsequently on the quality of medical services available to our citizens.
- The judgment about reserving a certain number of seats for students who had excelled at an all-India examination was delivered in 1984. We are in 2012. *Twenty-seven years having passed*, that blessed all-India examination is still entangled in the multi-strand tussles between the Medical Council of India, the Central government, state governments, and in the courts!
- The sequence that we have seen in this instance is not unique. Far from it, as the next instance involving benches of an even larger number of judges shows!

Seven clarify the clarification by five of what eleven had held

Since the late 1950s, litigation had been going on, and various judgments had been delivered about what the state could or could not prescribe to educational institutions that had been set up or were being managed by minorities – actually, what *is* a minority institution had itself been a matter of intense contention. Could their affairs be regulated in the ‘national interest’ ? Which aspects of management could the state regulate? The qualifications, emoluments and working conditions of staff, for instance? What about admissions? Would the state’s decrees regarding reservations apply to minority institutions also? What proportion of seats could the management give out at its own discretion? Could such institutions charge the infamous ‘capitation fee’? And so on.

Among the judgments that had given the widest degree of latitude to such institutions was the one delivered in 1992, namely, *St. Stephen’s College v. University of Delhi*.⁴² In 1993, an institution by the name of Islamic Academy of Education approached the Supreme Court against

directions sought to be given by the Government of Karnataka. The matter was assigned to a bench of five judges. At the very outset, the bench felt that just because an institution was a minority institution, it did not, by virtue of Article 30, get the right to choose whatever method of selecting students that it thought fit. The bench felt that the decision of the court in *St. Stephen's College* needed to be reviewed. That case had been decided by a bench of five judge – though Justice N.M. Kasliwal had contributed a most cogent dissent. The five-judge bench which had been constituted to deliberate on the writ of the Islamic Academy accordingly recommended that the case be placed before a bench of seven judges. On the basis of what lawyers for the contenders argued, the seven judges recommended that a bench of eleven judges be constituted.

And so a bench of eleven judges was constituted. Their judgment in *T.M.A. Pai Foundation v. State of Karnataka* was delivered in 2002. Covering around 92,000 words, it is longer than even my articles! Actually, there are four different judgment – five, if you count a concurring opinion as a judgment by itself.

Setting aside what the other judges had said, even the judgment delivered by the majority was taken to say different things by different state governments and, of course, by different institutions that claimed to be minority institutions. Such was the confusion and such the spate of litigation that followed in the wake of *T.M.A. Pai* that the very next year a bench of five judges had to be constituted to clarify what the *T.M.A. Pai* judgment had laid down. This bench delivered a judgment in *Islamic Academy of Education v. State of Karnataka* in 2003.⁴³

The clarifications confounded! The very next year, in 2004 – 05, the matters were again before the Supreme Court. Accordingly, a seven-judge bench was constituted to ascertain once again what the eleven-judge bench had said, and, next, to identify the questions on which the five-judge clarificatory bench, so to say, had done what it could not do, namely, where it had departed from what the eleven-judge bench had held. And from this we got the Supreme Court's judgment in *P.A. Inamdar v. State of Maharashtra*.⁴⁴

That this is by no means the end of the road is evident from what the five judges themselves said at the very outset in *P.A. Inamdar* about the

boundaries within which they had to decide the case. Here it is:

... At the very outset, we may state that our task is not to pronounce our own independent opinion on the several issues which arose for consideration in *Pai Foundation* [(2002) 8 SCC 481]. *Even if we are inclined to disagree with any of the findings amounting to declaration of law by the majority in Pai Foundation [(2002) 8 SCC 481] we cannot; that being a pronouncement by an eleven-Judge Bench, we are bound by it. We cannot express dissent or disagreement howsoever we may be inclined to do so on any of the issues.* The real task before us is to cull out the *ratio decidendi* of *Pai Foundation* [(2002) 8 SCC 481] and to examine if the explanation or clarification given in *Islamic Academy* [(2003) 6 SCC 697] runs counter to *Pai Foundation* [(2002) 8 SCC 481] and if so, to what extent. If we find anything said or held in *Islamic Academy* [(2003) 6 SCC 697] in conflict with *Pai Foundation* [(2002) 8 SCC 481] we shall say so as being a departure from the law laid down by *Pai Foundation* [(2002) 8 SCC 481] and on the principle of binding efficacy of precedents, overrule to that extent the opinion of the Constitution Bench in *Islamic Academy* [(2003) 6 SCC 697].⁴⁵

Who would need a clearer hint that the judges would have held differently if only they had not been just five against eleven?

One reason for this state of affairs is that the judges seem to have so much to say! As I mentioned, the judgment in *T.M.A. Pai Foundation* covers 92,000-odd words. *Ashoka Kumar Thakur* extends over 126,430 words. One of our most respected lawyers points to a contrast and its consequence: many British judges, he remarks, still write their judgments by hand. And that is one reason those judgments are so clear. Length apart, there is the structure of our judgments. So many of the judgments seem to have been stitched together rather than written. It is as if different points struck the judge as he went through the case; or he received different suggestions from fellow judges or others on his draft, and he just inserted the passages into his draft – without rethinking his thesis as a whole.

There is another reason also. Every judge in the UK and the United States knows for certain that what he writes will be read and analysed by scholars and even by practising advocates; that these analyses will be published; and that he will be confronted by his record time and again. More than anything else, it is this scrutiny which keeps judges on the alert. In India, only those judgments that involve high-profile public figures come up for notice, and then also the only point that gets noticed is whether the judgment has gone against or for the public figure. There is hardly any

public discussion or scholarly analysis of the judgments. And so “The moving finger writes, and, having writ, moves on – to the next writ!

The ready rationale

‘The founding fathers intended...’ ‘We must go by what the founding fathers set out to achieve ...’ That is the frequent refrain. In actual fact, on several matters the balance has been completely inverted. Few of these inversions have had consequences as dire as that of the relative weight to be assigned to Fundamental Rights and Directive Principles of State Policy.

Fundamental Rights were to be the ramparts within which each individual would be completely secure from assaults of the state. Other individuals and posses also could not breach these bastions. If others tried to breach them, it was to be the duty of the state to uphold and enforce the right of the individual. Directive Principles, on the other hand, were included to indicate the general direction in which state policies should proceed. Several of them were so generally – ‘vaguely? *‘deliberately vaguely’?* – worded that they could be taken to mean anything. “The State shall, in particular, direct its policy towards securing,’ Article 39 begins,

...(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;

For decades, this sort of a statement rationalized socialist controls, nationalization in particular. Were those controls and nationalizations the ways to ensure the common good? Several of them, and what was done ostensibly to fulfil them, bore the stamp of the socialist delusions of those days. Article 38(2) – ‘The State shall, in particular, strive to minimize the inequalities of income...’ Were the extortionate tax rates that did so much to create a black economy the way to minimize or to accentuate inequalities? Some of the Directive Principles that figure in the Constitution today were inserted as camouflage. Article 43-A, for instance – ‘The State shall take steps, by suitable legislation or in any other way, to secure the participation of workers in the management of undertakings, establishments or other organizations engaged in any industry’ -was inserted through the forty-second amendment for the same reason that the words ‘socialist’ and

‘secular’ were added in the Preamble: namely, to provide a progressive gloss to the Emergency.

There were two features that prevented excesses in the name of Directive Principles. First, while they were declared to be ‘fundamental to the governance of the country’, they were declared to be unenforceable by any court. And, second, it was clearly understood originally that they would be subordinate to Fundamental Rights.⁴⁶ In a well-known case, the Fundamental Right of a butcher under Article 19(1)(g) to pursue his profession and business was held to take precedence over the Directive Principle contained in Article 48 – that ‘the State shall strive towards prohibiting the slaughter of cows, calves and other milch and draught cattle.’⁴⁷

Rhetoric advanced – from our goal being a ‘democratic society’ to it being ‘a socialistic society’; from that to it being ‘a socialist society’; from that to the turn at which rulers, having grabbed for the Emergency to keep themselves in office, made full-blown socialism our goal. Today, though they often declaim that the very Preamble of our Constitution – a Preamble that was altered precisely during that very Emergency to provide a veneer of legitimacy to what was being done at the time – describes us to be, among other things, a ‘*socialist*’ Republic, few talk of socialism and controls. Yet, in regard to several schemes and acts of governments, the direction in which we had been hurtling has not changed, and that for an obvious reason. Genuine socialist aspiration has been replaced by an equally magnetic lodestone: populism. The less legitimate the political class has become, the more it has lunged for populism. And Directive Principles have become the constitutional rationale for every populist measure.

As this study has illustrated earlier, far from being immune to the rhetorical currents of the time – to ‘ideological currents’, as they are referred to by the committed – judges have been as influenced by them as run-of-the-mill editorialists. Indeed, given the times, and the glamour that was attached to progressive-ism, the judges who were foremost in stoking the currents garnered the maximum attention in the bargain. Most of all from liberals, eager, as they always were, to be progressive-by-association.

This hurtle had a constitutional consequence. With each round, Directive Principles were vaulted higher and higher above Fundamental Rights. First

it was said that the two had to be *read harmoniously*. Then that the two cannot be read except as *complementing and supplementing* each other. Then that Fundamental Rights *must be read in the light of* Directive Principles. Then that the Directive Principles must be *read into* Fundamental Rights. Then that Fundamental Rights are *the means* for achieving the goals set out in the Directive Principles. Then that '*no distinction can be made between the Directive Principles and Fundamental Rights.*'

Then that, when courts can adopt one 'principle of interpretation' or another for excavating the import of an article of the Constitution or the validity of a law, they should choose the one that furthers a Directive Principle. The Directive Principles became touchstones for assessing laws and amendments to the Constitution: any restriction imposed with the objective – that should read, 'with the *declared* objective' – of implementing a Directive Principle has to be presumed to be in the public interest, the courts held, and the law must be deemed to be valid even if it impairs a notion like equality guaranteed by Article 14.

A small volume can be filled listing such pronouncements.⁴⁸ Three brief examples from cases that were directly concerned with reservations will illustrate the progression. They will also illustrate how useful this tilting of the balance in favour of Directive Principles has been in rationalizing each enlargement of reservations; and thereby give us a glimpse of what is to come.

Mohini Jain was decided by a bench of two judges. They held that providing free, compulsory education is a mandate that the state has to fulfil in view of the Directive Principles. When it does not have sufficient resources and allows private institutions to come up, the latter are in fact instruments of the state for fulfilling that mandate. That is why they must not be pursuing commercial objectives, but providing a service. On this reasoning, the judges struck down the practice of charging capitation fees, and cabined private educational institutions to providing education more or less at the same terms and conditions as governmental institutions. What interests us at the moment is the way they read the right to education into the Constitution and declared it to be a Fundamental Right. In a representative passage while doing so, they declared:

The Directive Principles which are fundamental in the governance of the country *cannot be isolated from* the Fundamental Rights guaranteed under Part III. *These principles have to be read into the Fundamental Rights. Both are supplementary to each other.* The State is under a constitutional mandate to create conditions in which the Fundamental Rights guaranteed to the individuals under Part III could be enjoyed by all. Without making ‘right to education’ under Article 41 of the Constitution a reality the Fundamental Rights under Chapter III shall remain beyond the reach of large majority which is illiterate.⁴⁹

Reasoning thus, the judges decreed that every youth had a Fundamental Right to free and compulsory education. In fact, the judgment maintained in effect that every youth has a Fundamental Right to higher technical education also. Within the year, a five-judge bench had to consider the matter again. The judges declared that to maintain that every youth had a Fundamental Right to higher education would be too broad a proposition. The state just does not have the resources to provide free higher technical education as a matter of right to every youth, they said. But the state does have a duty to provide free, compulsory education to every child up to the age of fourteen. Invoking the progression in progressive judgments, in a representative passage, two of the judges observed:

... It is thus well established by the decisions of this Court that the provisions of Part III [guaranteeing Fundamental Rights] and IV [setting out Directive Principles] *are supplementary and complementary to each other and that Fundamental Rights are but a means to achieve the goal indicated in Part IV. It is also held that the Fundamental Rights must be construed in the light of the Directive Principles ...*⁵⁰

And here is another representative enunciation from a more recent case – one that is instructive not just in what it makes of Directive Principles but also in regard to the explanation that it constructs about why the Directive Principles were made non-justiciable in the first place:

From the constitutional history of India, it can be seen that from the point of view of importance and significance, *no distinction can be made* between the two sets of rights, namely, Fundamental Rights which are made justiciable and the Directive Principles which are made non-justiciable. *The Directive Principles of State Policy are made non-justiciable for the reason that the implementation of many of these rights would depend on the financial capability of the State.* Non-justiciable clause was provided for the reason that an infant State shall not be made accountable immediately for not fulfilling these obligations. Merely because the Directive Principles are non-justiciable by the judicial process does not mean that they are of subordinate

importance. In *Champakam Dorairajan case* [AIR 1951 SC 226 : 1951 SCR 525] it was observed that ‘the Directive Principles have to conform to and run subsidiary to the Chapter of Fundamental Rights.’ But this view did not hold for a long time and was later changed in a series of subsequent decisions. (See *Kerala Education Bill, 1957, In re* [AIR 1958 SC 956:1959 SCR 995]; *Minerva Mills* [(1980) 3 SCC 625 : AIR 1980 SC 1789].)⁵¹

Consider just two questions:

- Will the court speak with the same enthusiasm and determination about three other Directive Principle – Article 44 that directs the state to endeavour to secure a common civil code throughout the territory of India; Article 47 that directs the state to enforce prohibition; Article 48 that directs it to prohibit the slaughter of cows and calves and milch and draught cattle?
- After all, the implementation of these is not even constrained by the inadequate financial capacities of an infant state!

But Directive Principles it is. And we shall soon see the caricature to which this thrust leads.

The judgment everyone builds on

The judgment that rules the roost today in regard to reservations in government services is *M. Nagaraj v. Union of India*.⁵² The constitutional amendments that we have been considering came up for challenge in the case. Apart from arguments in law, the petitioners pointed to facts, facts that were patent, facts that pointed to the consequences that would result from steps that would be taken in the wake of the amendments. To take just one instance, as the judgment records, the petitioners pointed out that, as against six levels in a service, if accelerated seniority is given to the roster-point promotees, the consequence would be that a roster-point promotee in the graduate stream would reach the fourth level by the time he becomes forty-five years of age. At forty-nine, he would reach the highest level and stay there for nine years. On the other hand, the general-merit promotee would reach the third level out of the six at the age of fifty-six and, by the time he becomes eligible for just the 4th level, a level that the reservationist would have secured *eleven years earlier*, he would have retired from service. The

petitioners pointed out that this would result in reverse discrimination against general-category officers in the higher posts.

It is important to remember a fact like this for two reasons: first, to see what the court did about it in its judgment – given, in particular, its repeated emphasis on coming up with empirical facts; and, second, to look back and record what has happened in fact on the ground, so to say: has the apprehension come to pass? We will come to the facts in a moment. First the judgment.

Expressing its basic premise, the court said:

The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crises of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a constitutional provision does not get fossilised but remains flexible enough to meet the newly emerging problems and challenges.⁵³

We should pause right there for a moment. The words have a high ring. But their consequence in practice can go either way! Yes, the provisions should be interpreted with a ‘purposive approach’. Yes, the provisions should not be read in ‘a narrow and constricted sense’. Do these admonitions mean, for instance, that Article 14, Article 15(1) and (2), Article 16(1) and (2) should be read in such a way that the sturdiest possible safeguards are built around the right of every individual to equality? Or that the clauses in Articles 15 and 16 which allow exceptions to be made to equality should be read in expansive and purposive ways?

The Constitution being read with a ‘purposive approach’, amendments to it have to be assessed by evaluating their impact, not on individual provisions, but on the Basic Structure of the Constitution, the court declares. And while assessing the impact on the basic structure, the court shall look at the effects the amendments have on the ‘overarching principles’ of the Constitution – on occasion the court refers to them as ‘axioms’. These are principles that underlie several provisions and aspects of the Constitution or those that connect them.

Next, to what extent may these overarching principles or axioms be affected without tripping over the boundaries within which the court wants changes to remain? The word that the court uses time and again is ‘obliterate’. On occasion the court uses slightly different word – ‘destroyed’, ‘abrogated’ – but these words also connote change of the same order as ‘obliteration’. The reason, the court says, is that if the overarching principle is obliterated, we would be in a position where the Constitution as we know it would have ceased to exist. Or to put it in positive terms, the overarching principles may be impacted so long as the identity of the Constitution is maintained. That is, so long as the amendments do not entail a new Constitution altogether. That the amendments that have been challenged before it have been specifically designed to overturn decisions of the Supreme Court doesn’t weigh with the court at all. Indeed, the court is magnanimity embodied. The judgments of the Supreme Court are the law of the land, it says. And all that the amendments are doing is to change the law of the land!⁵⁴ Here is a typical passage on the way this criterion works out in practice:

To conclude, *the theory of basic structure is based on the concept of constitutional identity. The basic structure jurisprudence is a preoccupation with constitutional identity.* In *Kesavananda Bharati v. State of Kerala* [(1973) 4 SCC 225] it has been observed that ‘one cannot legally use the Constitution to destroy itself.’ It is further observed ‘the personality of the Constitution must remain unchanged.’ Therefore, this Court in *Kesavananda Bharati* [(1973) 4 SCC 225] while propounding the theory of basic structure, has relied upon the doctrine of constitutional identity. The word ‘amendment’ postulates that the old Constitution survives without loss of its identity despite the change and it continues even though it has been subjected to alteration. This is the constant theme of the opinions in the majority decision in *Kesavananda Bharati* [(1973) 4 SCC 225]. *To destroy its identity is to abrogate the basic structure of the Constitution. This is the principle of constitutional sovereignty ... The main object behind the theory of the constitutional identity is continuity and within that continuity of identity, changes are admissible depending upon the situation and circumstances of the day.*⁵⁵

And what are these ‘overarching principles’? The court gives only illustration – prefacing each enumeration with ‘overarching principles like ...’ or ending the enumeration with, ‘etc.’. The heads that it *does* mention at different places in this judgment are just three – secularism, federalism and constitutional sovereignty.

Next, the court says that the rules relating to those in government services that are being affected by the amendment in question – the ‘catch-up’ rule, the notion of ‘consequential *seniority*’-are just *judicially evolved concepts*. They have sprung from service jurisprudence, and are not notions taken from the Constitution. Erasing them or retaining them does not affect any of the overarching principles to such an extent that we get an altogether new Constitution. This is a new way of looking at a change. Hence, it is best to read what the court says on the matter:

... Reading the above judgments, we are of the view that the concept of ‘catch-up’ rule and ‘consequential seniority’ are *judicially evolved concepts* to control the extent of reservation. The source of these concepts is in service jurisprudence. These concepts cannot be elevated to the status of an axiom like secularism, constitutional sovereignty, etc. It cannot be said that by insertion of the concept of ‘consequential seniority’ the structure of Article 16(1) stands destroyed or abrogated. It cannot be said that ‘equality code’ under Articles 14,15 and 16 is violated by deletion of the ‘catch-up’ rule. *These concepts are based on practices*. However, such practices cannot be elevated to the status of a constitutional principle so as to be beyond the amending power of Parliament. Principles of service jurisprudence are different from constitutional limitations. Therefore, in our view neither the ‘catch-up’ rule nor the concept of ‘consequential seniority’ is implicit in clauses (1) and (4) of Article 16 as correctly held in *Virpal Singh Chauhan* [(1995) 6 SCC 684 :1996 SCC (L&S) 1 : (1995) 31 ATC 813].⁵⁶

How does the origin of a provision or rule or practice determine its significance? Is the primacy that is given in Supreme Court judgments these days to Directive Principles also not just a judicially evolved practice? Does the fact that the very idea of having Directive Principles at all was actually taken from the Irish constitution diminish or enhance their significance? Does the fact that Article 21 speaks of ‘procedure established by law’ and not ‘due process’ originated from what Justice Frankfurter told Sir B.N. Rau in an informal conversation alter its significance? Does the fact that by far the largest part of the Constitution in fact originates from the Government of India Act of 1935 diminish its significance? Indeed, the notion of the basic structure is itself, and entirely a judicially evolved concept!

That last illustration itself provides an instance of how origins metamorphose! The basic structure doctrine, the court says ‘has essentially developed from the German Constitution,’ and adds, ‘This development is the emergence of the constitutional principles in their own right. It is not

based on literal wordings.’ And under the German constitution, what is inviolable is ‘human dignity’. Two steps follow. First, ‘No exact definition of human dignity exists,’ the court notes. Second, in regard to such an overarching principle – one that underlies and interconnects several specific rights like freedom of the press, of religion, etc. – it is the duty of the state not only to desist from breaching it, the state must facilitate its consummation.⁵⁷

The net result is that the status of Fundamental Rights is turned over. When the Constitution was adopted, these rights were constructed as bulwarks for the individual – ramparts that the state could not breach. With new meaning having been read into, say, ‘equality’, some would say a deeper meaning having been read into it – ‘equality in fact rather than equality in law’; and the State being in duty bound to facilitate the achievement of the newly endowed equality, reservations and the rest become compulsory mandates rather than exceptions.

But to proceed.

The imperative that the identity of the Constitution be maintained gives rise to the ‘identity test’ for assessing an amendment. The second test is what the court, following earlier judgments, calls the ‘width test’. What is the width of the power that the change is placing at the disposal of, say, the executive? Here also, we have to be careful, the court says. Does the amendment confer power of such magnitude on the executive that the boundaries that had been set for the exercise of that power in the Constitution are obliterated? If the boundaries continue to exist – that is, if they are not obliterated altogether – the amendment is not conferring excessive power.⁵⁸ These are just enabling provisions, the court says of the new amendments. All they do is to make it possible for the states to provide reservations in promotions, to give consequential seniority, to relax qualifying standards, etc. The court declares more than once that not the power that is vested but its arbitrary use by those in whom it is vested is what violates the fundamental codes.⁵⁹ If and when that arbitrary use occurs, the aggrieved can, of course, come to us, and the courts shall examine the way that the power has been used.⁶⁰

A moment's digression will be well worth our while, for this is a central difference between what the courts have chosen to do in such cases and what this study argues should be the approach. The record shows that unless the courts proceed on the basis of the *potential inherent in a law or an amendment to the Constitution, unless they weigh the meta-consequences of their decisions*, they will merely be enabling the political class to take the country into the ditch – one step at a time. The same feature was invoked to turn a Nelson's eye to the ninety-third amendment which added clause (5) to Article 15 – the clause which enables the state to direct that reservations be made even in private educational institutions that do not receive any governmental aid. O, it is just an *enabling* amendment, judge after judge said in *Ashoka Kumar Thakur*. In his telling dissent, Justice Dalveer Bhandari put his finger on the consequences of this permissive generosity:

Amendments by their very nature are often enabling provisions. If they clear the way for future legislation that would in fact violate the basic structure, the Court need not wait for a potential violation to become an actual one. It can strike the entire amendment *ab initio*. The question of *potential width* was resolved in *Minerva Mills* [(1980) 3 SCC 625 : AIR 1980 SC 1789], paras 38 – 39. The Court acknowledged that it generally does not anticipate constitutional issues before they arise, but it *held* that circumstances required it to act before unconstitutional provisions could be passed under the authority of an unconstitutional amendment.

'38. But, we find it difficult to uphold the preliminary objection because, the question raised by the petitioners as regards constitutionality of Sections 4 and 55 of the Forty-second Amendment is not an academic or a hypothetical question. *The Forty-second Amendment is there for anyone to see* and by its Sections 4 and 55 amendments have been made to Articles 31-C and 368 of the Constitution. An order has been passed against the petitioners under Section 18-A of the Industries (Development and Regulation) Act, 1951, by which the petitioners are aggrieved. Besides there are two other relevant considerations which must be taken into account while dealing with the preliminary objection. There is no constitutional or statutory inhibition against the decision of questions before they actually arise for consideration. In view of the importance of *the question raised and in view of the fact that the question has been raised in many a petition, it is expedient in the interest of justice to settle the true position*. Secondly, what we are dealing with is not an ordinary law which may or may not be passed so that it could be said that our jurisdiction is being invoked on the hypothetical consideration that a law may be passed in future which will injure the rights of the petitioners. *We are dealing with a constitutional amendment which has been brought into operation which, of its own force, permits the violation of certain freedoms through laws passed for certain purposes*. We, therefore, overrule the preliminary objection and proceed to determine the point raised by the petitioners' (SCC p. 649, paras 38 – 39).

There is not one precise definition of the width test, however. The test asks if an amendment is so wide that in effect (actual or potential), it goes beyond Parliament's amending power.

Kesavananda [(1973) 4 SCC 225 : 1973 Supp SCR 1], SCC p. 427, para 532:('532.... But that the real consequences can be taken into account while judging the width of the power is settled. The Court cannot ignore the consequences to which a particular construction can lead ...'⁶¹

Next comes something that the court emphasizes again and again, but something by which hangs an ensuing tale. The court states:

The point which we are emphasising is that ultimately the present controversy is regarding the exercise of the power by the state Government depending upon the fact situation in each case. Therefore, 'vesting of the power' by an enabling provision may be constitutionally valid and yet 'exercise of the power' by the state in a given case may be arbitrary, *particularly, if the state fails to identify and measure backwardness and inadequacy keeping in mind the efficiency of service as required under Article 335.*⁶²

Again,

... Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, 'backwardness' and 'inadequacy of representation'. As stated above, equity, justice and efficiency are variable factors. These factors are context-specific. There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These are the limitations on the mode of the exercise of power by the State. None of these limitations have been removed by the impugned amendments. *If the State concerned fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid ...*⁶³

And yet again:

... As long as the boundaries mentioned in Article 16(4), namely, backwardness, inadequacy and efficiency of administration are retained in Articles 16(4-A) and 16(4-B) as controlling factors, we cannot attribute constitutional invalidity to these enabling provisions. However, *when the State fails to identify and implement the controlling factors then excessiveness comes in*, which is to be decided on the facts of each case. In a given case, where excessiveness results in reverse discrimination, this Court has to examine individual cases and decide the matter in accordance with law. This is the theory of 'guided power'. We may once again repeat that equality is not violated by mere conferment of power but it is breached by arbitrary exercise of the power conferred.⁶⁴

And a fourth time,

... In our present judgment, we are upholding the validity of the constitutional amendments subject to the limitations. Therefore, *in each case the Court has got to be satisfied that the State has exercised its opinion in making reservations in promotions for SCs and STs and for which the State concerned will have to place before the Court the requisite quantifiable data in each case and satisfy the Court that such reservations became necessary on account of inadequacy of representation of SCs/STs in a particular class or classes of posts without affecting general efficiency of service as mandated under Article 335 of the Constitution.*⁶⁵

Hence,

- The state must have identified the criteria by which backwardness of the class for which reservations are being made is to be measured; it must have identified the criteria by which the adequacy or inadequacy of representation of that backward class in the service is to be measured; and it must have identified the criteria by which the effect of the reservations that are being made – for instance, in promotions - on the overall efficiency of administration is to be measured.
- The state must then have collected quantitative data on each of the criteria.
- And in each instance, the state must present these criteria and the quantitative data to the court, and establish that it is operating within the constitutional boundaries.

Inquire in how many of the scores and scores of reservation-related cases this has been done. And whether the courts have taken anyone to task for not doing so.

How do the executive authorities escape these mandatory requirements? The judgment itself provides two loopholes through which they may skip free. First, it declares that, while merit and efficiency are important variables, what precisely they signify varies from circumstance to circumstance, from context to context. Second, the judgment says that, while maintenance of efficiency of administration is vital in view of Article 335, the state is in the best position to determine the extent to which efficiency is being affected and whether the effect is too onerous. As, after having delivered itself of eloquent statements on efficiency, etc., by these declarations the court gives the game away, the passages in the judgment are worth reading in full.

‘Merit is not a fixed absolute concept,’ the Court says. ‘Amartya Sen, in a book *Meritocracy and Economic Inequality*, edited by Kenneth Arrow, points out that merit is a dependent idea and its meaning depends on how a society defines a desirable act. An act of merit in one society may not be the same in another. The difficulty is that there is no natural order of “merit” independent of our value system. The content of merit is context-specific. It derives its meaning from particular conditions and purposes. The impact of any affirmative action policy on “merit” depends on how that policy is designed...’ The court notes a fatal flaw in the proceedings: ‘Unfortunately, in the present case, the debate before us on this point has taken place in an empirical vacuum.’ In fact, the petitioners had presented substantial empirical data. The court had chosen not to go into it at all – save to record in passing the one fact that I noted at the beginning of our discussion of the *Nagaraj* case, namely what the new amendments would entail for the manning of higher posts in the coming years. But clearly, this decision not to be distracted by facts was not an oversight. The court had what it calls a ‘basic presumption’:

*The basic presumption, however, remains that it is the State who is in the best position to define and measure merit in whatever ways it consider it to be relevant to public employment because ultimately it has to bear the costs arising from errors in defining and measuring merit. Similarly, the concept of ‘extent of reservation’ is not an absolute concept and like merit it is context-specific.*⁶⁶

That basic presumption comes up again and again – every time to the aid of the political class, for that is the class which, in its desperate bid for electoral advantage, is decreeing reservations in one sphere after another, at one level after another. Four paragraphs have not passed, and the court is emphasizing a vital consideration:

Reservation is necessary for transcending caste and not for perpetuating it. Reservation has to be used in a limited sense otherwise it will perpetuate casteism in the country.

Have reservations been reinforcing caste and casteism or transcending them? Are reservations being used in a ‘limited sense’? The court does not pause to consider. In the very next sentence it passes on to provide the rationalization for what is being done:

Reservation is underwritten by a special justification. Equality in Article 16(1) is individual-specific whereas reservation in Article 16(4) and Article 16(4-A) is enabling.

It adds a word of caution:

The discretion of the State is, however, subject to the existence of ‘backwardness’ and ‘inadequacy of representation’ in public employment. Backwardness has to be based on objective factors whereas inadequacy has to factually exist. This is where judicial review comes in.

Only to move on to the predictable ‘however’:

However, whether reservation in a given case is desirable or not, as a policy, is not for us to decide as long as the parameters mentioned in Articles 16(4) and 16(4-A) are maintained.

General statements having been made for covering all sides, it is time to give the game away to the political class:

As stated above, *equity, justice and merit (Article 335)/efficiency are variables which can only be identified and measured by the State*. Therefore, in each case, a contextual case has to be made out depending upon different circumstances which may exist Statewise.⁶⁷

The ‘on the one hand, and on the other’ is repeated twice soon enough, and, once again, the end result is to hand the matter over to the political class. ‘The object in enacting the enabling provisions like Articles 16(4), 16(4-A) and 16(4-B) is that the State is empowered to identify and recognise the compelling interests,’ the court notes. *‘If the State has quantifiable data to show backwardness and inadequacy then the State can make reservations in promotions keeping in mind maintenance of efficiency which is held to be a constitutional limitation on the discretion of the State in making reservation as indicated by Article 335.’* Hence, *‘If the State has quantifiable data to show*

But the very next sentences dilute the requirement to a nullity. As stated above, the concepts of efficiency, backwardness, inadequacy of representation are required to be identified and measured,’ the court says, and you might think that what it is doing is laying down conditions that have to be met before reservations, etc., are pushed through. You would be dead wrong.

The court proceeds to observe, ‘That exercise depends on availability of data,’ and you might again think that it is going to rule that the data should, therefore, be collected before enacting reservations. You would be dead wrong again.

For in the next sentence the court goes on to recognize, ‘That exercise depends on numerous factors.’ And the moral it draws is not about working through those numerous factors. The moral is at an altogether higher plane: ‘It is for this reason that enabling provisions are required to be made because each competing claim seeks to achieve certain goals. *How best one should optimise these conflicting claims can only be done by the administration in the context of local prevailing conditions in public employment....*’

‘As long as the boundaries mentioned in Article 16(4), namely, backwardness, inadequacy and efficiency of administration are retained in Articles 16(4-A) and 16(4-B) as controlling factors, we cannot attribute constitutional invalidity to these enabling provisions,’ the court continues. ‘However, *when the State fails to identify and implement the controlling factors then excessiveness comes in*, which is to be decided on the facts of each case. In a given case, where excessiveness results in reverse discrimination, this Court has to examine individual cases and decide the matter in accordance with law. This is the theory of ‘guided power’. We may once again repeat that equality is not violated by mere conferment of power but it is breached by arbitrary exercise of the power conferred.’⁶⁸

The net result is that the amendments to the Constitution that were enacted specifically to overturn its judgments are ratified by the Supreme Court, and the examination of the criteria by which the three boundaries are to be assessed as well as the examination of data about each of those criteria is postponed to the unknown future.

Applying the above tests to the proviso to Article 335 inserted by the Constitution (Eighty-second Amendment) Act, 2000 we find that the said proviso has a nexus with Articles 16(4-A) and 16(4-B). Efficiency in administration is held to be a constitutional limitation on the discretion vested in the State to provide for reservation in public employment. Under the proviso to Article 335, it is stated that nothing in Article 335 shall prevent the State to relax qualifying marks or standards of evaluation for reservation in promotion. This proviso is also confined only to members of SCs and STs. This proviso is also conferring discretionary power on the State to relax qualifying marks or standards of evaluation. Therefore, the question before us is – whether the State could be

empowered to relax qualifying marks or standards for reservation in matters of promotion. In our view, even after insertion of this proviso, the limitation of overall efficiency in Article 335 is not obliterated. Reason is that 'efficiency' is a variable factor. *It is for the State concerned to decide in a given case, whether the overall efficiency of the system is affected by such relaxation. If the relaxation is so excessive that it ceases to be qualifying marks then certainly in a given case, as in the past, the State is free not to relax such standards.*

One really is tempted to put an exclamation mark at the end of that sentence.

In other cases, the State may evolve a mechanism under which efficiency, equity and justice, all three variables, could be accommodated. Moreover, Article 335 is to be read with Article 46 which provides that the State shall promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice. Therefore, where the State finds compelling interests of backwardness and inadequacy, it may relax the qualifying marks for SCs/STs. These compelling interests however have to be identified by weighty and comparable data.⁶⁹

And what has happened in fact? Here is the court lamenting the fact that the debate before it has taken place in 'an empirical vacuum', but it never returns to verify what has happened as a result of its judgment. I contact M. Nagaraj. He has spent his working life in Karnataka, a state that has had a history of very high reservations. He is nearing retirement, and has himself had to suffer as a result of his juniors having been promoted over him solely because of birth.

Nagaraj and his colleagues send me tables that nail the iniquities that have followed. Nagaraj instructs me that engineers in three departments of the Karnataka government – the one working in which he has spent his life, the Public Works Department; the Water Resources Department; and the Department for Rural Development and Panchayati Raj – are governed by one common formula. In these departments, the Government of Karnataka has reserved 18 per cent of promotional posts for Scheduled Caste and Scheduled Tribe employees. The 18 per cent figure indicates what even such a state regards as 'adequate representation' in promotional posts. But already, as a result of carry-over, accelerated promotion and consequential seniority being legitimized, over 50 per cent of assistant executive engineers-2, the 'Diploma Engineers' as they are known, are from among

these two groups, of SCs and STs; 14 per cent of assistant executive engineers-1; 42 per cent of executive engineers; 44 per cent of superintending engineers and a full third of chief engineers are those who have catapulted over others by virtue of these extra-service considerations.

Nagaraj and his colleagues send me a series of case – listing names, date of entry into service, gradation number indicating the ‘entry seniority’ in the post of assistant engineer, etc. – of persons who joined the service on identical dates, between twenty-seven and twenty-nine years ago. The Scheduled Caste and Scheduled Tribe engineers became executive engineers in 2002/2003; they became superintending engineers in November 2011. The general-category engineers stagnate to this day as assistant executive engineers. A companion table lists cases of employees who had near-adjacent ‘Gradation Numbers’ as assistant engineers, that is they became assistant engineers on almost identical dates. In a typical case, a Scheduled Caste assistant engineer became an assistant executive engineer in 1987. The general-category engineer who was ahead of him by thirty places in the entry seniority list was promoted to that post only in 1996. In general, the Scheduled Caste and Scheduled Tribe engineers became assistant executive engineers ten to twelve years earlier than the general-category engineers. They became executive engineers in 2000, 2002 and 2003. They became chief engineers between May and December 2007. The general-category employees remain stuck at the executive engineer level to this day. Yet another table lists another lot of cases. The employees joined service on near-identical date – about twenty-five years ago. In a typical case, the Scheduled Caste engineer became an assistant executive engineer in 1997 – that is, almost fourteen years ago. The engineer who was fifty-five places ahead of him in the entry seniority list of assistant engineer remains an assistant engineer to this day. In general, as a result of the operation of the roster system, accelerated promotion and of consequential seniority, the Scheduled Caste employees became assistant executive engineers in April/May 1997. They became executive engineers in June 2009. The general-category employees remain stuck at the level of assistant engineers to this day.

Having invoked such high principles, having declared that, while crafting their reservations arrangements, governments must operate within those three boundaries, shouldn’t the court have prescribed that states shall

report the results to it at periodic intervals? Shouldn't it have ascertained the effect of its pronouncements on that imperative of the Constitution, one on which the court itself had placed such emphasis – efficiency of administration? Having cautioned that reservation schemes must not cause reverse discrimination, should the court not have instituted even an elementary mechanism to assess whether this was happening in fact as a result of its rulings?

But who is deterred by facts?

In sum, we get three braids in the judgment.

The seventy-seventh, eighty-first, eighty-second and eighty-fifth amendments had been challenged. The judgments upheld each of these as valid. Not every violation of a Fundamental Right amounts to a violation of the basic structure, the five-judge bench held in this case. For an amendment to infringe the basic structure, it must have completely *obliterated* not just a Fundamental Right but what it called the 'overarching principles' that underlie and connect several articles of the Constitution. And the articles so connected must themselves be of architectonic importance.

On the other hand, the judges held, to justify a specific action of the state – say, reservations in promotions within a cadre – the state has to show (1) that the class for which positions have been reserved is actually backward; (2) that it is inadequately represented in the service; and (3) that the enlargement of reservations that is being decreed will not adversely affect the general efficiency of administration and thereby violate the mandatory requirement of Article 335. To establish that the measure it has taken passes muster on these three criteria, (1) the state must have identified the variables by which, for instance, the effects on the efficiency of administration shall be assessed; (2) it must have quantified these variables; (3) it must have conducted a thorough exercise to collect and analyse the required data; and (4) it must furnish the criteria as well as the results of empirical investigation to the courts.

On the third hand, so to say, even as it laid down that, while making the reservations the state – in effect, the executive – must keep in mind, say, the effects on the efficiency of administration, the court, as we have seen, further said that the state is in the best position to quantify the three variables, and to assess the likely effect on the efficiency of administration.

The first of the three braids is, of course, the one that is the most consequential one as it crystallizes a trend in diluting what has stood as a dyke for the last thirty-five years, namely, the basic structure doctrine. But before we come to consider the consequences of this dilution, let us glance at what different courts have made of the second and third braids. And sure enough, they have read opposites into the boundaries and the requirements of observing them that the judgment has laid down.

What judges make of this judgment

Relying on the three criteria on which the decision must pass muster, several high courts have struck down what the respective governments had done on the ground that they had not carried out the exercises that were required by *M. Nagaraj* to quantify the variables, in particular the effect that their decision was going to have on the efficiency of administration. In several decisions, the high courts have pointed to the fact that, as the amendments were merely enabling ones, they did not create any right for any class to reservations nor did they cast a duty on the state – thus converting the very feature that *M. Nagaraj* seemed to have used to dampen the alarm at the amendments into a ground for rejecting measures to enlarge reservations even further. We have already seen this in the three judgments of the Andhra Pradesh High Court in regard to the reservations that the government of that state decreed in favour of Muslims. There are several others.⁷⁰ A single case will be sufficient to give us a glimpse of how the three boundaries and the exercises to identify and quantify them have led some of the judges to strike down what the governments had done.

In the wake of the constitutional amendment allowing for accelerated promotion with consequential seniority being provided for Scheduled Caste and Scheduled Tribe employees, the UP government issued orders decreeing these. In *Prem Kumar Singh v. State of Uttar Pradesh*,⁷¹ the Allahabad High Court struck down the UP government's order as well as the decision of the single-judge bench upholding that order, saying that 'The instructions now issued by the State, in our considered opinion, totally violate the law laid down by the Apex Court.' And this is how it set out the law that the Supreme Court had laid down in *M. Nagaraj*:

From the law laid down by the Apex Court... it is clear that the Apex Court has upheld the constitutional amendments but has laid down that this does not obliterate the constitutional requirements of ceiling limit of 50%, the concept of creamy layer, the sub-classification between OBCs on the one hand and SCs and STs on the other hand, and the concept of post based roster with inbuilt concept of replacements. It has also been clearly laid down that the State is not bound to make reservations for Scheduled Castes and Scheduled Tribes. However, if it chooses to exercise the powers vested in it to make such reservations, the State must collect quantifiable data showing backwardness of the class and inadequacy of representation of that class in public employment. In addition thereto Article 335 relating to efficiency must be also complied with. It is subject to these guidelines that the constitutional validity of the amendments was upheld.⁷²

It agreed that, yes, it is the state that has to satisfy itself that the three boundaries which had been specified in *M. Nagaraj* are met, 'But for drawing such requisite satisfaction, the existence of circumstances relevant to the formation of opinion is a *sine qua non*. If the opinion suffers from the vice of non-application of mind or formulation of collateral grounds or beyond the scope of Statute, or irrelevant and extraneous material, then that opinion is challengeable.' 'In fact, *M. Nagaraj* obliges the High Court that when a challenge is made to the reservation in promotion, it shall scrutinize the same on the given parameters and it also casts a corresponding duty upon the State Government to satisfy the Court about the exercise undertaken in making such a provision for reservation ...'

In accordance with *M. Nagaraj*, among the factors which the government must quantify is the effect that its decision is liable to have on the general efficiency of administration, the high court held, and recorded an observation that is significant for what it says as much as for the contrast it bears to how the Supreme Court itself had dealt with the same circumstance. 'This leads us to another very important point raised by the Petitioners that in a short period of time, all the posts of Heads of the Departments would be occupied by reserved category candidates not because of their merit, but because of giving them reservation in promotion along with accelerated seniority,' the high court noted. "This would certainly cause discontentment and heart-burning amongst the senior members of the service belonging to general category, which would certainly lower down the efficiency in administration.' Apart from the fact that this apprehension could not but be true, the truth of the matter, as we have seen, is that in the petitions that led to the *M. Nagaraj* verdict,

evidence had been presented to the Supreme Court that precisely this situation would come to prevail. The Supreme Court had just looked the other way. Two years later, as we have seen when we glanced at *Pushpa Rani's* case, the Supreme Court had, in fact, spurned this very consideration.⁷³ By contrast, the high court took a view that flowed not from what the Supreme Court had done in *M. Nagaraj* but from what it had prescribed in the judgment! 'It is neither the mandate nor the will of the Parliament that irrespective of the adequate representation of the Scheduled Castes and Scheduled Tribes on all posts or class of posts in the services under the State, promotion with or without accelerated seniority must be given to them,' the court observed. It rejected the claim of the state government that the new rule giving accelerated seniority along with accelerated promotion had been introduced to give effect to the new constitutional amendment. 'Reservation in promotion on any class or classes of posts in the services under the State,' it said, using exactly the proposition of the Supreme Court that the amendment was merely an enabling one, 'can neither be provided as a matter of course, nor can it be claimed as a matter of right but can only be provided under compulsive circumstances in consonance with the constitutional provisions.' And the state had neither carried out the exercise to quantify these compelling circumstances, the high court noted, nor had it made an attempt to establish them to the court.

There was yet another circumstance in the UP case which had the consequence that, even if a class was established to be backward, it would not be eligible for accelerated promotion with accelerated seniority because it would not be inadequately represented in the relevant posts. This circumstance was as follows. Against the vacancies that had been reserved for each of the three categories of employee – the general category, the Scheduled Caste employees and the Scheduled Tribe employee – the government maintained three separate eligibility lists for promotion. Now, when only employees from a particular reserved category could be promoted to vacancies in a particular list, 'there would rarely be a case of inadequate representation...' Using the very tests that *M. Nagaraj* had laid down, the high court concluded, 'It is only in a case where both of the two factors, namely, backwardness of the class and inadequate representation on

a class or classes of posts in the services under the State do exist that the question of granting accelerated seniority may arise, but even in such a case, the State has to satisfy that no compromise is made with the efficiency in administration and such a rule does not violate the essence of Article 335 of the Constitution, nor it results into reverse discrimination.’

The high court found a final circumstance, and because of it called a halt to what the government had been doing for a long time, and was continuing to do. The state had enacted a legislation in 1994, much before the constitutional amendment, ‘making an almost permanent provision for reservation, or to say, for indefinite period, which is evident by the fact, that, though more than eighteen years have passed from the date when the judgment in *Indra Sawhney’s* case was pronounced, the reservation is still continuing in promotion and that too without taking recourse to the constitutional requirements despite the fact that prior to the 77th and 85th Amendments of the Constitution, there was no constitutional provision for such reservation in promotion and after the aforesaid amendments in the Constitution, no exercise has been done by the State in this regard and the same very provisions of reservation are continuing.’ The state cannot continue with these reservations in promotions till it carries out the requisite exercises to quantify backwardness and inadequate representation; till it establishes that the reservations it proposes will not affect adversely the efficiency of administration, and till it establishes that its scheme shall not result in reverse discrimination. All this the high court held basing itself entirely on what the Supreme Court had held in *M. Nagaraj*!⁷⁴

And on the other side, we have cases in which judges were able to read the opposite into *M. Nagaraj* – cases from both the high courts and the Supreme Court itself. To take a single instance, in *Sanjeev Kumar Singh v. State of Uttar Pradesh*,⁷⁵ the same Allahabad High Court turned the requirement and onus of meeting it upside down. The petitioners argued that the state government had not produced the data that *M. Nagaraj* mandated – data that would establish that the classes for whom reservations were being made were indeed backward, that they were indeed inadequately represented in the services, and that the reservations that were being decreed would not adversely affect the efficiency of administration. The court held:

In this case however, though the arguments have been advanced but we do not find any material at all to suggest even or to whisper that the representation in any public employment *ex-facie* cannot be said to be inadequate or that the backwardness does not exist. In other words, for want of relevant material, therefore, we are not able to appreciate whether any class of backward citizen can be said to be adequately represented in service, and thus have to proceed by treating that all such classes are still not adequately represented and continuance of reservation for such categories is valid and not unconstitutional.

Predictably, the high court invoked *M. Nagaraj* to maintain that merit is a relative concept in any case... It then went on to cite various rulings of the Supreme Court which emphasized that the state must ensure that the classes for which reservations are being made are backward, that they are inadequately represented, etc., and, having approved what the state government was doing, concluded:

At this stage we direct the State Government of UP to observe the above principles while considering representation of respective classes in service and to find out whether the respective classes are adequately represented in service or not.

After all, it is the Court. It can put the horse either before or after the coach!

It needn't even do that. It can just look through the horse as if it isn't there! A challenge arose to the notifications by the Central government that allowed general-category students a total of four attempts at the IAS examination, those from among Other Backward Classes seven attempts, and candidates from Scheduled Classes or Tribes an unlimited number of attempts. The petitioner maintained that this was destructive of his right to equality. The Delhi High Court rejected the plea. It held that allowing four, seven and an unlimited number of attempts at the examination, was an act not of differentiation but of classification. It invoked *Indra Sawhney* and, of course, *M. Nagaraj*. At no stage did it ask the state to furnish any data relating to those three boundaries that the Supreme Court had been so emphatic about in *M. Nagaraj*.⁷⁶

But why remain with the high courts? The Supreme Court itself provides an even more graphic example.

A battering ram

*Indian Medical Association v. Union of India*⁷⁷ shows how a bench of the Supreme Court itself understood the import of *M. Nagaraj* as well as cases that had dealt with the question of reservations in private educational institutions, and how it was able to convert them into a battering ram.

Recall that there had been three judgments on the question of whether the government had the authority to decree reservations in private educational institutions. In its last judgment, *P.A. Inamdar v. State of Maharashtra*, a seven-judge bench of the Supreme Court had held that were government to acquire the power to determine who shall be admitted to half the number of seats in such institutions, it would in effect amount to nationalization of education, and, hence, government could not seize such authority. The government had responded by getting Parliament to pass the ninety-third amendment. This amendment had added clause (5) to Article 15, and provided that nothing in the main article would come in the way of government decreeing reservations in private educational institution – even if they were not receiving any assistance from the state.

The right of the army College of Medical Sciences (henceforth, ACMS) to confine admission to children of current and former army personnel and of widows of army personnel was challenged. The college was run by a charitable trust, the Army Welfare Education Society. It was funded entirely out of regimental funds. The trust and the college had been set up because of the hardships that children of army personnel faced in their education – with their parents being posted to faraway, often remote places, and because of their being shifted around frequently from station to station.

A single-judge bench of the Delhi High Court had upheld the admissions policy of the ACMS, and its autonomy. The judgment had been appealed. The division bench of the high court had again held in favour of the admissions policy of the ACMS. The matter came up before a two-judge bench of the Supreme Court. This bench overturned the high court judgments, and held that, like other private unaided non-minority educational institutions, the ACMS must adhere to the reservation edicts.

Bear in mind that the three principal judgments on reservations in private educational institution – *T.M.A. Pai Foundation v. State of Karnataka*, *Islamic Academy of Education v. State of Karnataka* and *P.A. Inamdar v. State of Maharashtra* – had been decided by benches of eleven,

five and seven judges respectively. The judgment that we are considering now, that in *Indian Medical Association*, as we just noted, was delivered by a two-judge bench. The two judges were not deterred by that at all! “The learned Senior Counsel,’ they remark at one point, ‘also seemed to be advocating the position that we ought to assume that *T.M.A. Pai*, as explained in *P.A. Inamdar*, is the final word with respect to the content of Clause (g) of Clause (1) of Article 19⁷⁸ even in the context of a Basic Structure review.’ ‘This we hold leads us into a tautological *cul-de-sac*,’ they declare. And the judges go on to set out the dictionary meaning of ‘tautology’, and how what they shall be dealing with – the basic structure doctrine – has not been dealt with in the earlier judgments.⁷⁹ ‘Except for two references, in two paragraphs in a judgment spanning 450 paragraphs in total, *T.M.A. Pai* does not speak of the Basic Structure doctrine at all ...’ they say.⁸⁰ Could it be that judges in the *Pai* Bench had felt that the basic structure doctrine was so evident, and had been set out so many times that they need not spend paragraphs on it? In any event, it would seem that, even if the eleven judges who decided *T.M.A. Pai* and others who pronounced other judgments had dealt with that doctrine, our judges would not have been discouraged from setting out their own thesis, and of building on *M.Nagaraj*! ‘In the first place,’ they write in a typical passage, ‘the assumption that subclause (g) of Clause (1) of Article 19 protections offered to private citizens, as enunciated by *T.M.A. Pai*, and elaborated in *P.A. Inamdar*, to be the ultimate word with respect to what the contents of such activities are is inapposite in the context of the Basic Structure test.’ What is being advocated, they declare, ‘would have us adopting the view that the starting point for the evaluation of impact of clause (5) of Article 15 with respect to the Basic Structure would also have to accept the views expressed by this Court in *T.M.A. Pai* [(2002) 8 SCC 481] to be given and deemed to be immutable, as if carved in stone.’⁸¹

They use strong words to set the eleven-judge decision aside. The words are used to differentiate what they are doing from the earlier judgment, but they are expressions that, to ordinary audiences, would read as stern censure. We should read these, as they illustrate a vital point that Justice

Ruma Pal made recently in the Tarkunde Memorial Lecture – the breakdown of judicial discipline.⁸²

This is what our two judges say about the eleven judges who decided *T.M.A. Pai*:

In terms of *M. Nagaraj* [*M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] ratio, what we have is a finding of this Court in *T.M.A. Pai* [(2002) 8 SCC 481] that freedoms of private unaided educational institutions under sub-clause (g) of clause (1) of Article 19 extend to the concept of being free from imposition of reservations, but not an analysis or finding about the status of that specific freedom i.e. freedom to be free from reservations, within the freedom code itself, much less an analysis of how that freedom to be free from reservations relates to the equality code, and constitutional identity in terms of its institutions of governance. Indeed, we do not even find that this Court has engaged in an analysis of the relationship of that right to be free from reservations in light of the powers granted to the State, under sub-clause (ii) of clause (6) of Article 19 to even abrogate, partially or wholly, the participation of private citizens in any of the activities guaranteed by sub-clause (g) of clause (1) of Article 19. Inasmuch as the issue of the content of the freedoms of non-minority unaided institutions came about collaterally, and were not the main issue under consideration, and notwithstanding the fact that this Court did issue an authoritative ruling with respect to such institutions under sub-clause (g) of clause (1) of Article 19. We also find that this Court did not engage in any discussion with respect to right to life under Article 21, nor to sub-clause (a) of clause (1) of Article 19 and its impact overall on the principles, and the actual processes of democracy, which would certainly include within itself the rights of people of all segments, regions and groups to possess the appropriate level of knowledge to be able to debate, discuss and influence social, political and economic choices of institutions. Such choices could have a vast impact on vital aspects that inform right to life under Article 21,⁸³

Their basic reason for delivering their own thesis, however, is different. It has to do with the tests that *M. Nagaraj* had prescribed – the ‘essences of rights test’ and the ‘overarching principles test’. ‘Indeed we are acutely aware that *T.M.A. Pai* [(2002) 8 SCC 481], is an eleven-Judge Bench judgment, and *P.A. Inamdar* [(2005) 6 SCC 537] to be a seven-Judge Bench judgment,’ the two judges write. ‘However, the very eloquent silence of the two Benches as to whether the contents they have read into sub-clause (g) of clause (1) of Article 19 to constitute a basic feature of the Constitution, is itself a clear indication that this Court, in those judgments was not engaging in that type of analysis. This Court, through another Constitutional Bench, *Islamic Academy* [(2003) 6 SCC 697], had also exhaustively examined the ratio in *T.M.A. Pai* [(2002) 8 SCC 481], and there is not even a whisper

therein that there is any indication in *T.M.A. Pai* [(2002) 8 SCC 481], that the right of private unaided educational institutions to be free from reservations would constitute a right of such magnitude that its partial truncation would abrogate the basic structure of our Constitution and change its very identity. What *T.M.A. Pai* [(2002) 8 SCC 481] did was essentially to engage in a “reasonableness standard” test based on the text of Article 19(1) (g). Nothing more.’ And they proceed to say that *P.A. Inamdar* itself ‘warns us’ to the effect that ‘certain recitals, certain observations and certain findings in *T.M.A. Pai* are contradictory *inter se*...

There are several questions which have remained unanswered ...⁸⁴ Did the seven judges who decided *P.A. Inamdar* say this in the context in which their words are being invoked – that *T.M.A. Pai* had left questions regarding the relation of the question it was dealing with to the basic structure unanswered or that its recitals, observations and findings in regard to this relationship to the basic structure were contradictory *inter se*?

In any event, on the case before them, the two judges hold that the Army College of Medical Sciences must provide reservations, and, on the question of the ninety-third amendment, they hold that, far from violating the Basic Structure of the Constitution, the amendment fortifies it. Both components of the judgment will give us a glimpse of where progressive jurisprudence in regard to reservations is taking the country.

Throughout, the judges set up straw men. Those arguing against reservations in private educational institutions are made out to want to recreate the plight of Ekalavya! They are portrayed as advocating the ‘exclusion from portals of knowledge of the “others”, deemed to be unfit even if lip-service of acknowledgment is paid that such “unfitness” may be due to no fault of theirs but is rather on account of their social, economic and cultural circumstances.’ The demand, they say, ‘gouges our very national soul.’ Even as higher education becomes vital for survival, these persons are demanding ‘that knowledge be parceled out, through tight-fisted notions of excellence, and concepts of merit that pander to the early advantages of already empowered groups.’⁸⁵ Who has advocated such exclusion?

Those who oppose extension of reservations are portrayed as being ones who advocate that decisions regarding higher education should be left to the

market! In fact, critics of reservations have been pointing out the opposite: that, while positive help of many kinds is needed by students who have not had a good start in life, current policies are baneful precisely because they equate affirmative action with reservations. Of the many things that are wrong with current policies, this one is one of the principal ones. They have been saying time and again that the ‘market’ shall *not* deliver the outcomes that our country needs; that precisely for that reason, there must be programmes that provide positive help of many kinds. Their charge has been that, instead of putting in the effort to ensure positive help programmes of this kind, the political class has been taking the easy way out – that of just decreeing reservations and making out that it has actually done its duty by the disadvantaged. In reading the caricatures that these two judges paint, it really is amusing that at one point⁸⁶ they cite a study by Devesh Kapur and Pratap Bhanu Mehta – little knowing or perhaps, from their lofty pedestal, choosing to ignore as irrelevant the fact that in that study the authors do *not* advocate reservations as the solution to anything; that, in fact, *to mark his protest against the government’s decision to bring about the ninety-third amendment, Pratap Bhanu Mehta resigned from the Knowledge Commission!*

But caricatures carry the day! ‘One cannot and ought not to deem that the ideologies of liberalization, privatization and globalization have now stained the entire constitutional fabric itself, thereby altering its very identity...’ they declaim.⁸⁷ ‘The falsity of the *knee-jerk beliefs* that markets are necessarily efficient, and will necessarily find optimal and just solutions for all problems, was again provided by the recent global financial crisis’ – who has advocated knee-jerk belief in markets in the field of education? And what is the relevance of the global financial crisis for reservations in private unaided educational institutions in India? ‘That unregulated laissez-faire free markets would only lead to massive market failures, even with respect to those aspects in which markets are supposed to function efficiently, such as wealth generation has to be accepted as a fundamental truth’ – from this to reservations as the solution! ‘With respect to other social values and goals, it has also been shown that *the complete evisceration of the power of the State to regulate the private sector* would lead to massive redistributions of incomes, assets and resources in favour of

the few, as against the multitude, thereby generating even greater inequalities’ – but who has advocated the ‘complete evisceration of the power of the State to regulate the private sector’? ‘This would also suppress *the ability of the State to exercise moral authority, and force, to keep competing interests, spread across groups, regions, and classes, from degenerating into a war of all against all*’ – a state manned by the corrupt and venal, so many of whom are eager instruments of ‘competing interests, spread across groups, regions, and classes’ to say nothing of the moneyed, of gangs and the rest, is going ‘to exercise moral authority, and force’? And the alternative is ‘a war of all against all’?⁸⁸

Globalization-liberalization-privatization (from the way they write, the three words are best hyphenated) have left the state with insufficient resource – of course, it doesn’t matter to them one whit that total receipts of the Central government, and, as education is a concurrent subject, of the Central and state governments together are today *fifteen times* what they were when reforms began in the early 1990s! And that the state has less to spend on education and health because it is squandering vast sums on boondoggles that are justified on the exact same rhetoric that they are deploying. In any event, as far as the two judges are concerned, as the resources that the state has are not sufficient, educational institutions have come up in the private sector. Not to mandate reservations in these ‘would mean that a vast majority of youngsters, notwithstanding a naturally equal distribution of talent and ability, belonging to disadvantaged groups would be left without access to higher education at all. That would constitute *a state of social emergency with a potential for conflagration that would be on an unimaginable scale*.’⁸⁹ Indeed, it would entail restricting higher education only to the privileged, and thereby ‘*invite cultural genocide*’.⁹⁰

On the other hand, ensuring reservations in private educational institutions even when they do not receive any aid from governments will, apart from fulfilling the goals set out in the Constitution, bring so many boons. Innovation would accelerate.

Innovation would become more meaningful. It isn’t just that the pool of innovators will enlarge, it isn’t just that innovation will multiply. Only the disadvantaged know what innovations are needed. Their inputs will transform general innovations into products that will really help.

Another layer of complexity could be visualised: innovation, particularly when it is based on specific information, that is more likely to be gained through long years of exposure to specific crafts, problems, social patterns, etc. Such information tends to be 'sticky' i.e. it is not easily specifiable and transferable, is specific to people who actually have had the relevant exposure, and may need to be addressed at the location of the problem. Further, it would also mean that unless the putative innovator actually knows what the problems are, in a region, or specifically to a community, he or she would not even know that the problem really exists to begin the process of adapting technical inventions to solve those particular problems. Inasmuch as the innovator does not belong to such communities, even if they are broadly aware of the problem, they may not have sufficient 'sticky' knowledge about it to innovate an appropriate product or service or solution to effectively solve such problems ...

And judges so against globalization and the rest cite a foreigner's study to prove the point! They continue:

... Most certainly one could conceive of situations in which such youngsters by virtue of their social backgrounds may be the only ones who would have the knowledge that a problem exists, or the cultural and emotional commitment to acknowledge that such problems also need to be addressed and solved, for both personal gain as well as social gain.

From that expectation to questions that are answers!

How do we compare the social value of such activities, which may be getting enhanced on account of youngsters from the Socially and Educationally Backward Classes and the Scheduled Castes and the Scheduled Tribes being admitted to colleges, both professional and nonprofessional, as against the value generated from being employed in some multinational company? Why should the constitutional discourse undervalue the importance of the former? Are the lives of people from socially disadvantaged backgrounds to be deemed to be not a constitutional concern? The fact that the former may not be quantifiable, or in popular and elite culture not acknowledged, does not mean that they are less valuable.

And from innovation to democracy itself:

We can conceive tremendous gains in another respect also. Increasingly, with technological advances, the choices made by societies with respect to which technology is chosen for implementation, which technology is discarded, which technology is promoted and the costs, both direct and indirect, such as environmental externalities, would have a tremendous impact on social and economic aspects, that range from global to local in impact. The implementation of such technologies has an impact on multiple constitutional rights, from Article 21 to issues of hidden bias against the lower classes. If the people in these Socially and Educationally Backward Classes, and in the Scheduled Castes and Scheduled Tribes are to engage in these debates, about the choices being made, assess the impacts on their own lives, and articulate, then surely they

would also require youngsters from amongst themselves who could understand the vast changes taking place in the socio-economic organisations, on account of rapid technological changes, and explain to them, or understand them and articulate their hopes, fears and aspirations. This would mean that apart from Article 21 implications for the dignity of lives of other members of such disadvantaged groups, there are also implications about Article 19 freedoms themselves. These rights are extended to all citizens, and one of the fundamental reasons why they are extended is to ensure that every citizen is capable of engaging in a civil, reasoned and reasonable debate about social, economic and political choices. This would obviously deepen and enrich the democratic processes of this country, and thereby make it more stable.⁹¹

Furthermore, the students would be studying in a diverse environment reflecting the diversity of India, the place in which most of them would be working later on. This exposure to diversity will also equip them better for living in a global society.⁹² Reservations in private unaided institutions will ‘promote more informed, reasoned and reasonable debate by individuals belonging to various deprived segments of the population...’ and thereby strengthen the democratic institutions of our country and our social fabric.

In any case, the knowledge from which those running these private institution – the ones striving to set up gated communities of exclusion – are aiming to exclude the disadvantaged is not something that they have created. It is best to hear the judges themselves – for, in their view, what they are doing by ensuring that reservations are extended to private unaided educational institutions is to prevent the destruction of humanity, no less:

Knowledge is the vital force that unites people. Knowledge is generated in diverse circumstances, in the practical arenas that range from a highly technical and clinical laboratory, to the humble farmer, or a hut-dweller eking out a bare subsistence. It is an accumulated gift of humanity to itself. The knowledge that non-minority educational institutions seek to impart is not knowledge that they have created. That knowledge was shared by people who have generated such knowledge out of love for humanity. Knowledge is shared by human beings all over the world out of love for humanity. Knowledge was passed down from the dark and forgotten past, out of love for humanity. To attempt to convert that knowledge into ‘gated communities of exclusion’ would be to sow the seeds of destruction of humanity.⁹³

Jo hyper-bole so nihāl, as my friend T.C.A. Rangachari would say. One wonders: is there a single boon that will not flow from, and only from reservations being extended to unaided private educational institutions?

And will all this come to pass? The judges seem to give the game away! They say, ‘... by the insertion of clause (5) of Article 15, the Ninety-third Constitutional Amendment has empowered the State to enact legislations that *may* have very far-reaching beneficial consequences for the nation. In point of fact, each and every one of the beneficial consequences we have discussed *as being possible*, would enhance the social justice content of the equality code, provide for enhancements of social and economic welfare at the lower end of the social and economic spectrum which can only behove to the benefit of all the citizens ...’⁹⁴

And what of some negatives that may come about? For instance, once standards are lowered; once students come to look upon admission to higher courses as matters of entitlement rather than hard work, wouldn’t the standards of education fall? *Haven’t* they fallen? Indeed, to cite the very study they invoke, that of Devesh Kapur and Pratap Bhanu Mehta, does that study and the numerous other writings of these very authors not document in detail how woefully these standards have fallen? Ah, but that may not be because of reservations but because of general mismanagement of our institutions of higher learning, the judges declare breezily.⁹⁵ And move on!

The empirical case settled, the next question is the Constitution. Recall that in *P.A. Inamdar*, a bench of seven judges of the Supreme Court had held that for government to usurp the right to decide how 50 per cent of admissions would be done in even private institutions, in even those private institutions that did not receive any governmental aid, would in effect be to nationalize education. They had, therefore, struck down the edict.

The government pushed the ninety-third amendment to the Constitution to overturn this decision. The amendment added clause (5) to Article 15, a clause that gave it the power to do exactly what the Supreme Court had struck down as unconstitutional. And how do our judges view that amendment? Most graciously, to say the least. It is just ‘an enabling provision’, they say – as the bench had said in *M. Nagaraj*. And it has been brought about only ‘in response’ to the court’s ‘explanation’ that the restriction that they had imposed – mandating reservation – was an unreasonable restriction on the Fundamental Right guaranteed by Article 19(1)(g). “The purpose of the amendment was to clarify or amend the Constitution in a manner that what was held to be unreasonable would now

be reasonable by virtue of the constitutional status given to such measures,' they say.⁹⁶ And, presto, unreasonable is reasonable!

In any case, what has been restricted? True, Article 19(1)(g) guarantees every citizen the Fundamental Right to practise the occupation, profession, business or trade of his choice. But all that the new amendment is doing is to restrict the freedom in regard to *one* activity of *one* occupation among the myriad occupations and professions that a person can pursue. Moreover, the restriction is only in regard to *one* of the many rights that Article 19(1) guarantees. This logic seems so improbable that it is best to read what these judges declare on the matter:

... In the light of the above discussion, we are of the opinion that it is impermissible for us to apply the direct impact and effects test to evaluate whether clause (5) of Article 15 provisions with respect to admissions to unaided non-minority educational institutions violate the basic structure. By no stretch of imagination could the provisions of clause (5) of Article 15 be deemed to be so wide as to eliminate an entire chapter of Fundamental Rights, or permit complete evisceration of even the freedom to engage in *one of the occupations of the many occupations guaranteed by sub-clause (g) of clause (1) of Article 19*. The correct test would be the 'essences of rights' test i.e. the 'overarching principles' test as enunciated in *M. Nagaraj [M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013]*, to which we turn below.⁹⁷

And again, five paragraphs later,

... By no stretch of imagination could one claim that truncation of *one of the activities that were deemed to have been one of the many essential features of one of the occupations of the many occupations that are guaranteed by one of the clauses of the freedom code*, by itself could constitute an overarching principle, and further that such a principle has been abrogated. It is not the change in the identity of any one element of the conspectus of activities of one occupation in a plethora of occupations that itself forms a part of the many different kinds of freedoms that leads to the violation of the basic structure doctrine; but rather whether the overarching principles, that connect one Fundamental Right to the other that are so abrogated as to change the very identity of the Constitution which is the true test to evaluate whether a constitutional amendment has violated the basic structure doctrine.⁹⁸

Such gas would be nauseating had it been emitted from some place other than the Supreme Court. But there is more than gas. There is dangerous 'principle'.

The grave danger

The passages take us back to what is one of the principal grounds on which the Supreme Court has begun to validate such amendments -and it is in this that the gravest danger for future jurisprudence lies.

- The touchstone used to be the violation of a Fundamental Right.
- That became the violation not of the Fundamental Right but of ‘the *essence* of the right’.
- That in turn became not the violation of that ‘essence of the right’ but the *obliteration* of the essence of the right.
- That in a further turn became not the obliteration of the essence of one right but the violation of the ‘*overarching principles*’ underlying different provisions of the Constitution.
- That became the obliteration of the ‘overarching principles’ to such an extent that we got in effect a new Constitution.
- In the hands of our two judges, it is not even the obliteration of the ‘overarching principles’. The touchstone is the *obliteration of the ‘essence of the overarching principles’*.

The Supreme Court has been trekking along this deadly descent from judgment to judgment. *Indian Medical Association* brings out in bold relief the point that has already been reached in the descent.

Basing themselves on what the Supreme Court has held in earlier judgment – in particular, *I.R. Coelho v. State of Tamil Nadu*⁹⁹ – the judges make a distinction between amendments to the Constitution that, let us say, put a law into the Ninth Schedule, and amendments which, so to say, run deeper. The two sets of amendments, they say, have to be assessed by differing yardsticks:

... The kinds of amendments where by laws are placed in the Ninth Schedule only enjoy a ‘fictional immunity’ and they would have to be tested by using *the direct impact and effect test* i.e. ‘*the rights test*’ or even *the essence of each Fundamental Right* that has been deemed to be a part of the basic structure. The laws placed in the Ninth Schedule are ordinarily enacted, and then placed in the Ninth Schedule by a constitutional amendment, simpliciter, and enjoy only a ‘fictional immunity’ pursuant to Article 31-B. This is in contrast to the situation where a constitutional amendment effectuates changes in the main provisions of the Constitution, particularly in Part III. In such a constitutional amendment, the ‘*essences of rights*’ test used in *M.*

Nagaraj [M. Nagaraj v. Union of India, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013], wherein *the essences of the rights are identified across entire equality, freedom and judicial review codes i.e. 'overarching principles' of such codes*, and then the particular constitutional amendment is evaluated as to whether it completely changes the very 'identity' of the entire Constitution itself. Those 'overarching principles' are what give the Constitution its identity, and *when they are destroyed* would the identity of the Constitution have been changed completely.¹⁰⁰

Hence, not a Fundamental Right. But its 'essence'. Not the essence of one right but the 'essences' of an array of rights. From those 'essences' to the effect of the amendment on 'overarching principles'. And only when that effect is of such a magnitude that the overarching principles are 'destroyed' is the amendment to be struck down.

So, what are these 'overarching principles' and how may we recognize them? To begin with, the judges stress, to understand the import of a Fundamental Right, we have to go not just by – in fact, in terms of their declarations, the expression should be, 'not so much by' – the text pertaining to that right in the Constitution or an amendment; 'rather it needs to be gleaned from the matrices of interrelationships, with other Fundamental Rights and provisions in other parts of the Constitution, thereby recognising the transformations effectuated on each other ...' For reviewing the amendment or action, the court has to focus on 'overarching principles informing *all* of the Fundamental Rights'. Its task in such instances is to examine the effect of the amendment on 'the essences of *each of those* overarching principles'.

Hence, for an amendment to fall foul of the Constitution, its destructive effects must extend to '*all of the Fundamental Rights*', and, second, it must undermine 'the essences of *each of those* overarching principles' underlying the Constitution.¹⁰¹

And to what extent must this undermining go before it results in a Constitutional amendment becoming ultra vires? Here is the next breakthrough! The undermining must be of a degree that it *obliterates* those essences. Indeed, the essences it obliterates must be such that, because of their obliteration, the Constitution as we know it is destroyed and we have an entirely new Constitution!

Sounds unbelievable? So, let us get back to the text of the judgment, and read in some detail what the judges hold. Here it is:

Further, the Court in *M. Nagaraj* [*M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] recognised that the standard of judicial review of a constitutional amendment, on the touchstone of the doctrine of the basic structure, is an entirely different exercise than review of State legislation with respect to its impact on a specific Fundamental Right. Analysing the rationale and mode of analysis of the Court in *S.R. Bommai v. Union of India* [(1994) 3 SCC 1], it was stated, in para 23, that: (*M. Nagaraj case* [*M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013], SCC pp. 242 – 43) ‘23... it is important to note that the *recognition of a basic structure in the context of amendment provides an insight that there are, beyond the words of particular provisions, systematic principles underlying and connecting the provisions of the Constitution. These principles give coherence to the Constitution and make it an organic whole.* These principles are part of constitutional law even if they are not expressly stated in the form of rules. An instance is the principle of reasonableness which connects Articles 14, 19 and 21. Some of these principles may be so important and fundamental, as to qualify as ‘essential features’ or part of the ‘basic structure’ of the Constitution, that is to say, they are not open to amendment. However, *it is only by linking provisions to such overarching principles that one would be able to distinguish essential from less essential features of the Constitution.*’ (emphasis added). It was further specified at SCC p. 243, para 24 that certain principles, such as federalism, socialism, secularism and reasonableness ‘*are beyond the words of a particular provision. They are systematic and structural principles underlying and connecting various provisions of the Constitution*’ (emphasis supplied).

... From the above we can glean that evaluation of whether a particular amendment has amended those ‘overarching principles’ is the test for basic structure. It is not the specific instances of expression of contents of a Fundamental Right, as stated by the courts prior to an amendment which are to become the anvil of the test of basic structure when the amending power is exercised and a main element of the provisions of the Constitution is altered. Rather, the courts have to be careful in assessing whether those overarching principles themselves are abrogated. By no stretch of imagination could one claim that truncation of one of the activities that were deemed to have been one of the many essential features of one of the occupations of the many occupations that are guaranteed by one of the clauses of the freedom code, by itself could constitute an overarching principle, and further that such a principle has been abrogated. It is not the change in the identity of any one element of the conspectus of activities of one occupation in a plethora of occupations that itself forms a part of the many different kinds of freedoms that leads to the violation of the basic structure doctrine; but rather whether the overarching principles, that connect one Fundamental Right to the other that are so abrogated as to change the very identity of the Constitution which is the true test to evaluate whether a constitutional amendment has violated the basic structure doctrine.¹⁰²

Hence, the tests are: does the amendment in question assail the overarching principles? Does it assail them to such an extent that the very identity of the Constitution is destroyed, and we have in effect a different Constitution? That last is the key to the matter. They invoke *M. Nagaraj* again:

In this regard, the Court in *M. Nagaraj* [*M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] further goes on to pithily state that the standard to be applied in evaluating whether an amendment has also modified the overarching principles, that inform each and every Fundamental Right and link them, is to *find whether because of such a change we have a completely different Constitution*. In particular, summarising the various opinions in *Kesavananda Bharati* [(1973) 4 SCC 225], it was stated: (*M. Nagaraj case* [*M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013], SCC p. 244, para 28) ‘28. To conclude, the theory of basic structure is based on the concept of constitutional identity. The basic structure jurisprudence is a preoccupation with constitutional identity. The word “amendment” postulates that the old Constitution survives without loss of its identity despite the change and it continues even though it has been subjected to alteration. This is the constant theme of the opinions in the majority decision in *Kesavananda Bharati* [(1973) 4 SCC 225]. *To destroy its identity is to abrogate the basic structure of the Constitution.... The main object behind the theory of the constitutional identity is continuity and within that continuity of identity, changes are admissible depending upon the situation and circumstances of the day.*¹⁰³

By now in full flight, the judges give a breathtaking analogy. The Constitution is akin to the ship of Theseus, they state. That was the ship by battling from which the Greeks had felled a mighty Minotaur. They had brought the ship to harbour. As planks rotted, the youth replaced them successively. But the ship remained as that ship. It could still perform the same function as the original ship. It could be used to sail in a chosen direction exactly like the original ship. The same goes for our Constitution, our judges reason: some of its parts will necessarily have to be replaced from time to time -indeed, that is why this particular ship has built into it the power to provide replacement parts, the power of amendment. It does not matter how many parts have been replaced, nor, it would seem, how much they differ from the original parts. So long as the ship of the Constitution enables the country to continue to sail in the chosen direction – of equality, fraternity, federalism, socialism, secularism – the amendments must be seen as necessary replacements of worn-out parts. And the identity of the ship must be taken to being preserved. That is the judges’ reasoning and that is the conclusion they reach.

Nor should we be deterred by the fact that in replacing some parts, a few incidental ones may get weakened:

If indeed one essential activity of the many essential ones that form the freedom to engage in one of the occupations of the many occupations that are a part of the many freedoms guaranteed by the Constitution, conflicts with an amendment that intends to strengthen the process of

achievement of one of the main navigational tools and thereby the goals of the nation State itself, should such an amendment be declared to be unconstitutional and against the basic structure? Shouldn't one also look at the damage that such a declaration can cause to many of the other basic features of the Constitution, and also the loss of diverse strengths that such an amendment is likely to impart to many other essential or basic features of our Constitution? We opine that by not undertaking an assessment of such factors we would almost certainly lead to erroneous judgments that would destroy the basic structure of the Constitution.¹⁰⁴

There are many other flourishes to the judgment: the Constitution is a dynamic document; provisions of the Constitution must not be read pedantically but capaciously so as to clear the way for the country to progress towards becoming the land of egalitarian equality; it is not the text of a provision that matters but the moral dimension...

And which is the 'overarching principle' that the reservations are in pursuit of? Not the principle of equality as it is enshrined in Articles 14; 15(1) and (2); 16(1) and (2); and 21. No. The overarching principle is '*egalitarian equality*'. And, as we have seen earlier, this exaltation flows from the same device: under play Fundamental Rights, and exalt the Directive Principles. A single passage from the judgment will illustrate the 'logic' as well as the recent genealogy of the device:

In this respect, the placement of clause (5) of Article 15 in the equality code, by the Ninety-third Constitutional Amendment is of great significance. It clearly situates itself within the broad egalitarian objectives of the Constitution. In this sense, what it does is that it enlarges as opposed to truncating, an essential and indeed a primordial feature of the equality code. Furthermore, both *M. Nagaraj* [*M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013] and *Ashoka Kumar Thakur* [(2008) 6 SCC 1] stand for the proposition that enlargement of the egalitarian content of the equality code ought not to necessarily be deemed as a derogation from the formal equality guaranteed by Articles 14, 15(1) or 16(1). Achievement of such egalitarian objectives within the context of employment or of education, in the public sector, as long as the measures do not truncate elements of formal equality *disproportionately*, were deemed to be inherent parts of the promise of real equality for all citizens.

How the convenient word creeps in – 'as long as the measures do not truncate elements of formal equality *disproportionately*'.

As stated succinctly in *M. Nagaraj* [*M. Nagaraj v. Union of India*, (2006) 8 SCC 212 : (2007) 1 SCC (L&S) 1013], SCC p. 250, para 51, it is an issue of proportionality. 'Concept of "proportional equality" expects the States to take affirmative action in favour of disadvantaged sections of the society within the framework of liberal democracy' and further that: (SCC p. 250,

para 52) ‘52. Under the Indian Constitution, while basic liberties are guaranteed and individual initiative is encouraged, the State has got the role of ensuring that no class prospers at the cost of other class and *no person suffers because of drawbacks which is [sic] not his but social.*’ (emphasis supplied.¹⁰⁵

In the light of this ship-of-Theseus thesis, recall the notorious thirty-ninth or even the forty-second amendment of the Constitution.¹⁰⁶ After all, the thirty-ninth amendment put beyond challenge the elections of those holding just four office – the president, the vice-president, the Speaker and the prime minister. After all, it made lawful only the four corrupt practices of which Mrs Indira Gandhi had been held guilty, and declared that these shall be deemed to be and to have always been lawful. It is not that the amendment had abolished all elections. It is not that the amendment had put all elections beyond challenge. None of those overarching principles that our judges have listed – federalism, equality, secularism, socialism – had been touched: in fact, socialism was introduced into the Preamble only at that time. So, the basic structure had in fact been *strengthened*, no? Only one sliver of a plank of the ship – the elections of four of the thousands of officers of state – had been put beyond challenge. And these four definitely formed a distinct class ...

Not just the thirty-ninth and forty-second amendments, I would venture to argue that the successive replacements made by the military dictators of Pakistan in that country’s 1973 Constitution would pass the ship-of-Theseus test that these judges have set out. Nor have they done so on their own. All they have done is to bring onto the surface what was happening step by step from one judgment to the next.

The breach widened

The matter does not end with *Indian Medical Association*, of course. The theses continue to be stated and restated in successive judgments, each successive restatement widening the path for the executive and for legislatures. A single example will suffice.

*Glanrock Estate v. State of Tamil Nadu*¹⁰⁷ arose as follows. The thirty-fourth amendment to the Constitution put a law passed by the Tamil Nadu legislature – the Gudular Janmam Estates (Abolition and Conversion into

Ryotwari) Act of 1969—into the Ninth Schedule. This act extended land reforms legislation of the early 1960s to the Gudular taluka of the Nilgiris. The act spawned a spate of writs.

Eventually, the matter came before the Supreme Court. In its judgment, the three-judge bench, headed by the Chief Justice S.H. Kapadia, restates the touchstones that have been laid out in earlier cases like *I.R. Coelho*. Of course, the reiteration is restrained and has none of rhetorical excesses of *Indian Medical Association*. But even such a judgment advances an idea or two, even it uses expressions that will become devices in the hands of progressive benches to justify eroding even further the equality that the Constitution originally provided.

The time has come, the judgment says, to explain certain concepts in *LR. Coelho* ‘like egalitarian equality, overarching principles and reading Article 21 with Article 14’. In applying these concepts, it says, one has to bear in mind the ‘degree test’ – ‘one has to go by the degree of abrogation as well as the degree of elevation of an ordinary principle of equality to the level of overarching principle(s).’¹⁰⁸ In other words, one has to inquire: to what degree does the constitutional amendment abrogate the ordinary notion of, say, equality; and to what degree does it elevate the overarching concept of equality. An ordinary law can be challenged on the ground that it violates a provision of the Constitution. But an amendment of the Constitution can be challenged only on two grounds: on the ground either that the legislature did not have the power to legislate that amendment; or on the ground that the amendment violates the Basic Structure of the Constitution.¹⁰⁹

That distinction has become commonplace in our judgments— though it does seem both enigmatic as well as dangerous. Picture a government wanting to push through an arrangement or scheme that blatantly falls foul of a vital provision of the Constitution. It knows that the proposal will be struck down. It introduces the same arrangement through an amendment to the Constitution. The bar is now much, much higher, and the arrangement can easily saunter under it.

The bar is raised in two ways. On the one hand, the amendment passes muster if it does not violate—actually, ‘if its does not obliterate’—the overarching principles. And, on the other, the executive and legislature are given freedom to make changes so long as they can show—or, as we saw,

by the readiness with which the Supreme Court in *M. Nagaraj* accepted the Statements of Objects and Reasons at face value, so long as they can assert—that the changes are being made in pursuit of newer and newer desiderata. *Glanrock* illustrates both ways of lifting the bar.

‘What is an overarching principle?’ the Court asks, and answers: ‘Concepts like secularism, democracy, separation of powers, power of judicial review fall outside the scope of amendatory powers of Parliament under Article 368. If any of these were to be deleted it would require changes to be made not only in Part III of the Constitution but also in Article 245 and the three lists of the Constitution resulting in the change of the very structure or framework of the Constitution.’

Notice three things. First, none of the ‘overarching principles’ that have been listed—even though the list begins with ‘Concepts *like...*’—would ever come in the way of the kind of amendments and decrees pushed through by casteist and opportunistic politicians that we have been considering in this study. Those principles— secularism, democracy, separation of powers, power of judicial review—are too far away—looming somewhere near the distant, indeed ever-receding horizon. Second, notice the touchstone—to fall foul of the ‘overarching principles’ test, the change must necessitate changes in a series of provisions of the Constitution. And the most important element in the enunciation: to what degree must the change in these overarching principles be before it will fall foul of the judges? ‘If any of these’—the overarching principles—‘were to be *deleted* ...’ the court says.

And then comes the second limb—adding content to one of these overarching principles. We have seen how judges vied to read more and more rights into the right to ‘life or liberty’ guaranteed by Article 21. Over the decades, the right has been declared to include a right to livelihood; to adequate nutrition; to clothing; to shelter; to facilities for reading, writing and expressing oneself; to health; to meeting and interacting with others; to protection of the health of workers; to having facilities for children to grow in dignity, to study, to play; to maternity relief; to one’s reputation; to relief and compensation from industrial accidents; to rehabilitation when one is dislocated because of, say, the construction of a dam; to better homes for destitute women; to remand and observation homes for children; to the right for prisoners to write their memoirs; to a healthy environment; to roads in

inaccessible parts of hill areas; to education; to privacy; to legal aid; and recently to sound sleep ... The same sort of march has been going on in regard to ‘equality’. It has accelerated!

First, ‘equality’ was rewritten as ‘egalitarian equality’. The former—which is what is mentioned in the Constitution—was said to refer to only one aspect, and, it would seem from reading the judgments, to a superficial aspect of equality, namely equality before law. What the founders of the Constitution *really* had in mind, the judges have declared, is ‘egalitarian equality’, an expression which they say means *equality in fact*. Egalitarian equality has now been declared to be identical to *proportional* equality—both in the sense that, as we saw in *R.K. Sabharwal*, in providing reservations for a group or caste, governments will look at the proportion that group, etc., form of the total population; and in the sense that the truncation of ‘formal equality’ may not be disproportionate.¹¹⁰ By virtue of this transformation, they have put their seal on every enlargement of reservations—it is just a step towards creating equality in fact, they have declared; so much so that by now inequality in law has come to be the norm.

Now comes the second phase. More and more things are being read into this new expression, ‘egalitarian equality’. Following decisions of the forest bench of the Supreme Court, *Glanrock* declares that ‘*intergenerational equity*’ is a part of egalitarian equality, and is part of Article 21 of the Constitution.¹¹¹ Next, that ‘*sustainable development*’ is part of Article 21.¹¹² And from that, it declares ‘*inclusive growth*’ to be part of Article 21 read with Article 14.¹¹³

Three features are noteworthy. First, though ever so well intentioned, formulations of this kind give license for anything and everything that governments do today. These formulations and the judgments in which they occur deploy expressions—‘sustainable development’, ‘inclusive growth’—that have no precise meaning either in law or in public discourse. Many desirable measures have been taken in the name of ‘intergenerational equity’ and ‘sustainable growth’. And just as many arbitrary and publicity-seeking edicts have been decreed under the same shibboleths. These days ‘inclusive growth’ has become the coverall for every populist dole—from

unsustainable subsidies, to employment guarantees, to free power, to free TV sets. And, in terms of a judgment such as *Indian Medical Association*, who can object to free TV sets? After all, to list just one boon, they enable the poor to become aware of what is happening in the world; and thereby make them more-aware citizens; and thereby make for more meaningful participation in public affairs; and thereby strengthen democracy, which, of course, is one of the overarching principles of the Constitution ...

Second, the causal sequence is certainly not clear! Is it that the substance signified by these new expressions—‘intergenerational equity’, ‘sustainable growth’, ‘inclusive growth’—is vital and, therefore, a part of an overarching principle? Or is it that it is part of an overarching principle and, therefore, vital and not to be bruised? ‘When we talk of intergenerational equity and sustainable development,’ says the Court, ‘we are elevating an ordinary principle of equality to the level of overarching principle.’¹¹⁴ Such expressions can only mean that the equality that is mentioned in Articles 14, 15(1) and (2), 16(1) and (2) is just a run-of-the-mill equality that can be thrown around. It is when and only when equality is used to include the content of these new expressions that it becomes one of those overarching principles that are beyond reach of the Parliament’s amendatory powers.

Third, while on the one hand the concept—‘egalitarian equality’ in this instance—is made to swell in this way, on the other the extent of violation of equality under law—as enshrined in Articles 14, 15(1) and (2), 16(1) and (2) and the all-important Article 21—which will lead to the striking down of an amendment is put higher and higher. ‘... Therefore, it is only that breach of the principle of equality which is of the character of *destroying* the basic framework of the Constitution which will be protected by Article 31-B,’ the Court holds. “The point to be noted, therefore, is that when constitutional law is challenged, one has to apply the “effect test” to find out the degree of abrogation’ the Court says. ‘This is the “degree test” which has been referred to earlier. If one finds that the constitutional amendment seeks to *abrogate* core values/overarching principles like secularism, egalitarian equality, etc. and *which would warrant rewriting of the Constitution* then such constitutional law would certainly violate the basic structure.’¹¹⁵ The net result is spelt out by one of the judges a little later:

We have to first examine whether the provisions of the Janmam Act [the particular Act which was in question in the case] included in the Ninth Schedule by the Constitution (Thirty-fourth amendment) Act, 1974 is violating any of the rights guaranteed under Part III of the Constitution, and if our answer is in the affirmative, our further enquiry would be whether the violation so found has *abrogated or destroyed* the basic structure of the Constitution. On such examination, if our answer is in the affirmative, the result would be invalidation of the Act to the extent of its violation. The petitioner, therefore, cannot succeed merely by establishing that any of his Fundamental Rights have been violated but he has to further show that the violation has the effect of *abrogating* the basic structure of the Constitution. Once it is established, the onus would shift to the State to justify the infraction of the Fundamental Right, and if they fail, still the State can show that such infraction has not *abrogated or destroyed* the basic structure of the Constitution. Violation of Fundamental Right, may not, therefore, ipso facto, violate the basic structure doctrine, but a law which violates the basic structure invariably violates some of the rights guaranteed under Part III, but not vice versa. A law which infringes a basic feature of the Constitution cannot be validated under Article 31-B, by inserting it in the Ninth Schedule of the Constitution.¹¹⁶

A disheartening pass

From non-justiciable Directive Principles to imperatives.

From Fundamental Rights which are truly fundamental to ones that are a mere means to achieving what is said to be indicated by the Directive Principles.

From Fundamental Rights to overarching principles underlying or interconnecting Fundamental Rights.

From those to whether an overarching principle has been completely abrogated or destroyed.

From that to whether *each of the* overarching principles has been obliterated.

From that to whether they have been destroyed so extensively and to such an extent that we have an entirely new and different Constitution...

The bar has been raised too high, I fear, and gives far too extensive a latitude to the executive and the legislatures. Too extensive a latitude, if truth be told, to increasingly desperate, and less and less worthy executives and legislatures.

Today, the consequence is ever-swelling reservations. Tomorrow it will be something else.

What we can do

In the large, we have little option except to wait for the recoil of consequences. But in the meanwhile, we can do a few small things.

- Read and analyse the judgments, and alert as many as we can reach to where they are taking the country.
- Stand by those who are in court contesting this downward procession—what a sorry state it is that they do not get any help even in engaging lawyers.
- Garner facts—hard, empirical, irrefutable data—about the consequences that successive enlargements of reservations are having—in regard to equity and to governance.

These are small things. But, done well, they will go far, and they are within our capacity. I have the fullest confidence that the efforts we make to realize these modest objectives will be vindicated by time.

Index of cases

Abhay Nath v. University of Delhi, (2009) 17 SCC 705
Ajay Kumar Singh v. State of Bihar, (1994) 4 SCC 401
Ajit Singh (II) v. State of Punjab, (1999) 7 SCC 209
Ajit Singh Januja v. State of Punjab, (1996) 2 SCC 715
Ajit Singh Januja v. State of Punjab, (1999) 7 SCC 209
Akhil Bharatiya Soshit Karamchari Sangh (Rly) v. Union of India, (1981) 1 SCC 246
All India Institute of Medical Sciences Students Union v. All India Institute of Medical Sciences, (2002) 1 SCC 428
Amardeev Singh v. State of Himachal Pradesh, (2009) 3 Shim LC 148
Andhra Pradesh Public Services Commission v. Baloji Badhavath, (2009) 5 SCC 1
Annamalai Palkalaikazhaga Ambedkar Asiriyar Sangam v. Vice Chancellor, (2010) Indlaw MAD 720

M.G. Badavpananvar v. State of Karnataka, (2001) 2 SCC 666
M.R. Balaji v. State of Mysore, AIR (1963) SC 649
Bhim Singhji v. Union of India, (1981) 1 SCC 166
Bijender Singh v. Union of India, WP(C) No, 3450/2011, MANU/DE/ 1992/2011

Anil Chandra v. Radha Krishna Gaur, (2009) 9 SCC 454
Subhash Chandra v. Delhi Subordinate Services Selection Board, (2009) 15 SCC 458
Chattar Singh v. State of Rajasthan, (1996) 11 SCC 742
Saurabh Chaudri v. Union of India, (2003) 11 SCC 146
Arati Ray Choudhury v. Union of India, (1974) 1 SCC 87
E.V. Chinnaiah v. State of Andhra Pradesh, (2005) 1 SCC 394
R. Chitrlekha v. State of Mysore, AIR (1964) SC 1823
Sibananda Choudhry v. State of Assam, (2010) 6 GLR 585
I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1
Comptroller & Auditor General of India v. K.S Jagannathan, (1986) 2 SCC 679

T. Devadasan v. Union of India, AIR (1964) SC 179
Mridul Dhar v. Union of India, (2005) 2 SCC 65
Dinesh Kumar v. Motilal Nehru Medical College, (1985) 3 SCC 22
Dinesh Kumar (II) v. Motilal Nehru Medical College, (1986) 3 SCC 727
K. Doraiswamy v. State of Tamil Nadu (2001) 2 SCC 538

M.P. Gangadharan, v. State of Kerala, (2006) 6 SCC 162
R.S. Garg v. State of Uttar Pradesh, (2006) 6 SCC 430
General Manager, Southern Railways v. Rangachari, AIR (1962) SC 36
Glanrock Estate Private Limited v. State of Tamil Nadu, (2010) 10 SCC 96
Ashok Kumar Gupta v. State of Uttar Pradesh, (1997) 5 SCC 201
Gurvinder Singh v. State of Rajasthan, 2010 Raj HC, Civil Writ Petition no. 13491/2009

Hussainara Khatoon v. Home Secretary, State of Bihar, (1980) 1 SCC 81

P.A. Inamdar v. State of Maharashtra, (2005) 6 SCC 537
Indian Medical Association v. Union of India, (2011) 7 SCC 179
Indira Nehru Gandhi v. Raj Narain, (1975) 2 SCC 159
Indira Nehru Gandhi v. Raj Narain, (1975) Supp SCC 1
Indra Sawhney v. Union of India, (1992) Supp (3) SCC 217
Indra Sawhney (II) v. Union of India, (2000) 1 SCC 168
Islamic Academy of Education v. State of Karnataka, (2003) 6 SCC 697

Jagdish Lal v. State of Haryana, (1997) 6 SCC 538
Mohini Jain v. State of Karnataka, (1992) 3 SCC 666
Pradeep Jain v. Union of India, (1984) 3 SCC 654
Titendra Kumar Singh v. State of Uttar Pradesh, (2010) 3 SCC 119
K. Krishnamurthy v. Union of India, (2010) 7 SCC 202

M. Nagaraj v. Union of India, (2006) 8 SCC 212
Nair Service Society v. State of Kerala, (2007) 4 SCC 1

T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481
Janki Prasad Parimoo v. State of Jammu and Kashmir, (1973) 1 SCC 420
A. Peeriakaruppan v. State of Tamil Nadu, (1973) 1 SCC 38
Post Graduate Institute of Medical Education & Research Chandigarh v. Faculty Association, (1998) 4 SCC 1
Post Graduate Institute of Medical Education & Research v. K.L. Narasimhan, (1997) 6 SCC 283
Prem Kumar Singh v. State of Uttar Pradesh, (2011) 1 ADJ 549

Mohammed Hanif Qureshi v. State of Bihar, AIR 1958 SC 731

Raghunathrao Ganpatrao v. Union of India, (1993) Supp (1) SCC 191
H. Rajender v. Managing Director, Agricultural Cooperative Association Ltd., (2007) 6 ALD 184
Minor P. Rajendran v. State of Madras, (1968) 2 SCR 786
Ram Bhagat Singh v. State of Haryana, (1997) 11 SCC 417
Ranjith v. High Court of Kerala, (2009) 4 KLT 759

Marri Chandra Shekhar Rao v. Dean, Seth G.S Medical College, (1990) 3 SCC 130

T. Murlidhar Rao v. State of Andhra Pradesh, 2004 (6) ALD 1 (LB)

T. Murlidhar Rao v. State of Andhra Pradesh, 2010 (2) ALD 492 (LB)

Lagnajit Ray v. State of Orissa, (2011) 1 OLR 689

Archana Reddy B. v. State of Andhra Pradesh, 2005 (6) ALD 582 (LB)

R.K. Sabharwal v. State of Punjab, (1995) 2 SCC 745

Sanjeev Kumar Singh v. State of Uttar Pradesh, MANU/UP/1756/2006, Special Appeal 592 of 2006

Jagdish Saran v. Union of India, (1980) 2 SCC 768

Buddhi Prakash Sharma v. Union of India, (2005) 13 SCC 61

Sindhi Educational Society v. Chief Secretary, Government of NCT of Delhi, (2010) 8 SCC 49

Preeti Srivastav v. State of Madhya Pradesh, (1997) 7 SCC 120

St. Stephen's College v. University of Delhi, (1992) SCC 558

State of Andhra Pradesh v. A.P. Sagar, AIR 1968 SC 1379

State of Andhra Pradesh v. Archana Reddy, Supreme Court, 4 January 2006

State of Andhra Pradesh v. T. Murlidhar Rao, Supreme Court, 25 March 2010, MANU/SC/0225/2010

State of Andhra Pradesh v. U.S.V. Balram, (1972) 1 SCC 660

State of Bihar v. Bal Mukund Sah, (2000) 4 SCC 640

State of Kerala v. N.M. Thomas, (1976) 2 SCC 310

State of Madhya Pradesh v. Gopal D. Tirthani, (2003) 7 SCC 83

State of Madhya Pradesh v. Nivedita Jain, (1981) 4 SCC 296

State of Madras v. Champakam Dorairajan, AIR 1951 SC 226

State of Punjab v. Hira Lal, (1970) 3 SCC 567

State of Punjab v. Manjit Singh, (2003) 11 SCC 559

State of Uttar Pradesh v. Pradip Tandon, (1975) 1 SCC 267

Station Masters & Assistant Station Masters Association v. General Manager, Central Railways,
(1960) 2 SCR 311

Anupam Thakur v. State of Himachal Pradesh, MANU/HP/1976/ 2011

Ashoka Kumar Thakur v. State of Bihar, (1995) 5 SCC 403

Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1

Union of India v. Brij Lal Thakur, (1997) 4 SCC 278

Union of India v. Madhav, (1997) 2 SCC 332

Union of India v. Pushpa Rani, (2008) 9 SCC 242

Union of India v. Rakesh Kumar, (2010) 4 SCC 50

Union of India v. Virpal Singh Chauhan, (1995) 6 SCC 684

J.P. Unni Krishnan v. State of Andhra Pradesh, (1993) 1 SCC 645

K.C. Vasanth Kumar v. State of Karnataka, (1985) Supp SCC 714

B. Venkataramana v. State of Madras, AIR (1951) SC 229

S. Vinod Kumar v. Union of India, (1996) 6 SCC 580

Index

The pagination of this electronic edition does not match the edition from which it was created. To locate a specific passage, please use your ebook reader's search tools.

- Action Taken Memorandum: on first Backward Classes Commission: 7
- Activism: selective: 217 – 26, 296 – 301, 412 – 13; five features: 332 – 35
- Administration, efficiency of: VR Krishna Iyer, administration exists for efficient governance, not to provide jobs to *harijans*: 169; AN Ray: of paramount importance: 191; eight judges on disastrous effects of reservations in promotions on: 193 – 99; VR Krishna Iyer pooh-poohs: 21721; concern for, denounced as camouflage for perpetuating oppression: 231 – 37; analogy from teaching: 239 – 42; ‘won’t be affected’: 245 – 46; nature of government work: 340; Article 335 diluted: 400 – 01; reduced to nullity: 419 – 22, 451 – 57
- Admissions, results in field: reserved category v. general category students: 307 – 11; topper denied admission: 311
- Aga Khan: leads orchestrated delegation to viceroy: 27
- Ali, Fazl: why not 80 per cent reservation?: 181, 393; ‘reasoning’ pricked by RM Sahai: 181; promotion an incident of employment: 191; on not qualifying: 245 – 46
- Ali, Mohammed: Aligarh delegation, a ‘command performance’: 28
- Ambedkar, BR: on mystery about introduction of separate electorates for Muslims: 25; joins to secure separate electorates for Scheduled Castes: 30; on implication of ‘every Hindu has a caste’: 141 – 42; exception must not swallow the rule: 167; was he excluded through an examination?: 221; his examination marks as argument: 238 – 39; else violent overthrow: 302
- Andhra: reservations for Muslims in: 369 – 88
- Antony, AK: 360 – 61
- Antulay, AR: receives idea from God: 21 – 22
- Army College of Medical Sciences: subjected to reservations: 465 – 77
- Arrow, Kenneth: 453
- Asian Age, The*: Antulay’s *ilham*: 21
- Assessors: denounced as biased: 247 – 49
- Austin, Granville: 296
- Backward castes: under Islamic rule: 64 – 67; Mandal Commission’s identification of: 86 – 96; identification of, since Mandal: 96 – 98; real determinant is clout: 98 – 103; Mandal Commission

on how 'Backwards' oppress Scheduled Castes: 100 – 03; judges' descriptions do not fit 'Backwards': 103 – 05; are they to be akin to SCs/STs?: 14754; creamy layer to be hived off from: 154 – 57; what Kerala government and legislature did: 157 – 61; VR Krishna Iyer: benefits hogged by better off among: 149 – 50; Krishna Iyer decides to look the other way: 150,224 – 25; not castes!: 225 – 26; PB Sawant, that they are 77 1/2 per cent of population: 244; when universal franchise transfers power to: 244 – 45

Balakrishnan, KG: Bench headed by 'makes operational a law invalidated by High Court' : 38788,418 – 19; dilutes application of rule he has advanced: 42223; emphasizes ill-effects of caste-based reservations, then acquiesces: 425 – 26

Bar: for creamy layer put so high as to render it ineffective: 138 – 39; for ending reservations, put at an impossible level: 62 – 63,20710,245 – 46

Basic Feature: effect of reservations on representation: 324 – 25

Basu, Durga Das: 111

BBC: 302

Bhagwati, PN: 296

Bhai Parma Nand: 84

Bhandari, Dalveer: noteworthy dissent of: 405; absence of data, caste-based census horrifying: 417; ill effects of caste-based reservations: 427 – 28

Boundaries: within which reservations must remain: 45153; Executive must establish it has acted within: 370 – 84,451 – 53; game handed over: 453 – 57; contrary inferences from: 460 – 77

Carry-forward rule: effect of: 396, 400; Constitution amended to exceed 50 per cent limit via: 1213,177 – 79,399 – 400

Caste *sabhas*: representations to be recognized as higher castes: 69 – 78

Caste system: can be reinterpreted: 350; has its uses: 350 – 51; but should be jettisoned: 351; being erased: 69 – 81,351

Caste-based reservations: conditions necessary to prove reservations not caste-based: 35 – 36; Mandal Commission's enumeration based entirely on caste: 86 – 96; Rane Commission on consequences of: 78 – 81; IP Desai on consequences of: 79 – 80; malignancy recognized, then perpetuated: 424 – 28

Caste, as basis of identification, Supreme Court on: 106 – 46,42528; 'Only': 110 – 13 Castes: 'Dalits,' 'OBCs' become new: 33; expression deliberately shunned in Constitution: 34 – 35; difficulty of delineating: 37 – 39; 1931 census reports boundaries getting blurred: 39 – 44; changing appellations: 45 – 49; in flux: 4951; factors propelling change: 51 – 59; basis of assertions about voting patterns of: 59; reality vastly different from assertions in judgments: 60 – 64; violent fluctuations in enumeration of: 76 – 77; reasons enumeration/ tabulation should be abandoned: 37 – 44, 76 – 77, 82 – 85; abandoned: 86

Castes: race then to secure recognition as higher: 69 – 78; race now to get anointed 'backward': 78 – 81,426 – 28; adoption of customs associated with higher: 77 – 78; reverse claims now: 78 – 81

Census office: viewed as 'college of heralds': 69 – 78

Census, 1931: difficulties in defining caste: 37 – 39; boundaries of caste getting blurred: 39 – 44; race to be anointed as higher castes through: 69 – 78; caste enumeration/tabulation should be abandoned: 37 – 44, 76 – 77, 8286; abandoned: 86

Census: manoeuvres to hive sections out of Hindus: 30 – 31; caste-based census 'horrifying': 417

Chandrachud, YV: 'skeletal' sketch on reservations policy: 127

Cho Ramaswamy: 406 – 07

Commission for Backward Classes: not consulted in Andhra: 372; produces 'performance on command' when consulted: 374, 376 – 79; farce second time round: 382 – 84; work envisaged not done at central level: 416 – 17

Commissionerate for Minority Welfare, Andhra: farcical survey by: 369,371 – 74

Compliance: need for judiciary to demand reports on: 428 – 32

Consequential seniority: contradictory judgments on: 401 – 03

Constitution amended to ensure: 13 – 14,259 – 60,403; judgments on: 256 – 59; effect in services: 445, 457 – 59

Constituent Assembly: rejects communal reservations: 4 – 6; approach to, original provisions on reservations: 7 – 9; relevance for interpretation of debates of: 409

Constitution, Basic Structure: who is to judge violation of Constitution's?: 22; does violation of, evaporate because an article has been changed?: 199 – 200; VR Krishna Iyer dismisses argument of: 213 – 14; not individual provisions but overarching principles: 446 – 49; test is their obliteration: 446 – 51; bar to assess violation raised dangerously high: 450 – 51,47684,485 – 86; onus on Executive: 451 – 53; onus reversed: 453 – 57

Constitution, interpretation of: what was shunned by framers cannot be smuggled in: 145; relevance of American decisions: 146,409 – 10; activists on how it must be construed: 287 – 96; grandiloquence as an instrument in: 292 – 93; HR Khanna cautions against activist interpretations of: 293; activists' selectivity: 296 – 301; ultimate argument for activist interpretation: 301 – 03; expansive interpretations when objectives require: 409 – 11; strict constructionists on Articles 29, 30:411

Constitution: Articles as originally approved: 7 – 9; successive alterations and mutilations: 10 – 22,389 – 404; who is to judge violation of basic structure: 22; pattern of amendments of: 10 – 14, 20 – 22,389 – 404; significance of words in: 34 – 35

Creamy layer: to be hived off: 15457; what Kerala did: 157 – 61; not excluded in Andhra legislation for Muslims: 371 – 72,378; must be excluded: 394 – 95; KG Balakrishnan dilutes rule: 422 – 23

Datar, Arvind: 369,400,432,436, 443

Desai, DA: on court's view of caste-based classifications: 115, 118,120 – 21; on evil from caste-based identification: 125 – 27; 'Backwards' must be akin to SCs/STs: 149

Desai, IP: on consequences of caste-based reservations: 79 – 80,126

Directive Principles: vaulted higher and higher: 440 – 45

Directorate General of Health Services: reply on compliance with court orders: 430 – 31

Discourse: foreclosed: 347 – 48,35763; reviving it: 363 – 66,489 – 90

Dracau, AH: 71 – 72

Economic criteria for identifying beneficiaries: dubitable reasoning by which rejected: 121 – 24; ES Venkataramaiah, advocates means test: 132; O Chinnappa Reddy's reasons for rejecting: 135 – 37; Kuldip Singh's reasons for adopting: 137 – 38; PB Sawant puts bar for creamy layer so high as to render it ineffective: 138 – 39; Pandian's questionable reasons for rejecting: 139 – 41; judges urge adoption of: 425 – 28

Education, right to: 443 – 44

Empathy: will ensure excellence: 219 – 20,279 – 81

Equality: HR Khanna warns against diluting by overdoing classification: 114 – 15; ‘equality of opportunity’ replaced by that of ‘outcomes’: 207 – 14; taken to mean granting preference to some, then imposing handicaps on others: 209 – 12; egalitarian: 482 – 83,485 – 89

Examinations: alleged to be poor indices of merit: 220 – 21,238 – 39; Ambedkar’s marks in, as argument: 238 – 39; ‘not sure proof of excellence: 276 – 78; marks awarded ‘on basis of caste, creed, colour, religion, etc.’: 278; ‘heart’ more important than scores in exams: 413 – 15

Facts, Nelson’s eye to: examples: 107 – 08,267 – 68,396 – 97,457 – 59

Fundamental Rights: importance diluted: 440 – 45,477 – 81

Gajendragadkar, PB: exception must not swamp equality: 353

Galanter, Marc: on how castes could not be excluded: 99 – 100

Gandhi, Mahatma: attempt to stall separate electorate for Scheduled Castes: 31 – 32; has to agree to Yeravda Pact: 32; melts caste rigidities: 53; was he excluded through an examination?: 221

Gandhi, Mrs Indira: election case: 200 – 03

Garratt, GT: 58

Gilchrist, RN: 58

Globalization-liberalization-privatization: judges’ hyperbole on: 470 – 72

Gowda Commission: 104

Gupta, AC: warnings: 353 – 54

Gupta, Shekhar: 309

Havanur Commission: 98,104

Heart: more important than high scores: 413 – 15

Himachal Pradesh: vacancies in High Court: 21

Hindu, The: use of snippet from 1932: 61 – 62; on 78 per cent medical college seats being taken by OBCs & MBCs: 119; on Supreme Court passing interim orders for 11 years: 203

Hindus: manoeuvres to hive sections out of: 29 – 31

Home ministry: 1961 Circular to state governments against caste-based reservations: 7; order that there would be no reservations in promotions: 190 – 91

Hussain, S. Abid: on manoeuvre to introduce separate electorates: 26 – 29

Hussain, Zakir: 263

India: ever so different from assertions in judgments: 60 – 64

Indian Express, The: on Himachal Pradesh High Court vacancies: 21; on survey of Mandal Commission: 91 – 92; correspondents on surveys, post-Mandal: 96 – 98; results in field, of reserved category v. general category students: 307 – 11; RTI request on medical exams: 430 – 31

Induction: admonition on: 260 – 61; disregarded in related case: 261 62; in practice: 266 – 81

Islamic rule: effect on lower castes and tribals: 64 – 67

Joshi, PC: 82

Judgments: on medical college reservations require repeated clarifications: 432 – 37; on reservations in private unaided educational institutions require repeated clarifications: 437 – 40; contrary

inferences from: 460 – 65, 465 – 84; straw men set up in: 470 – 72

Judicial discipline: Ruma Pal on breakdown of: 467 – 68

Judiciary, reservations in: would have done it on our own!: 284 – 85; standards to be diluted enough to fill reserved posts: 285 – 87; prevalence: 336

Judiciary: reasons for using judgments: xiii-xiv; consequence of ambiguity: 106 – 07; Nelson's eye: 107 – 110, 222 – 23, 260, 267 69, 290 – 91, 396 – 97, 457-59; waives inconveniences away, examples: 108 – 110, 121; dubitable reasoning: 121 – 24; consequences of failure to punish for contempt: 157 – 61; reversals on better off among backwards: 149 – 50; Nelson's eye to earlier observation: 151 – 52; having declared efficiency of administration paramount, rationalizes relaxation of standards: 169 – 70; a word is inserted: 176 – 77; cases invoked that have little to do with matter at hand: 181 – 82; temporizes on reservations in promotions: 197 – 99; wages of compromise: 2000 – 04; creative reading: 213 – 14; contrast between two judgments: 217 – 26; selective activism: 296 – 301; evidence from judgments of ill-effects of reservations in promotions: 317-19; recourse to faith: 260 – 62, 269-71; homilies on induction: 260-62; homilies disregarded: 261 – 62; induction in practice: 266 – 81; strained reasoning illustrated: 270 – 74; differential treatment of same autonomous, expert body: 275 – 76; headnote jurisprudence: 282 – 83; timorousness: 284 – 85; activists on proper role of: 294-96; caveats, set aside: 330 – 31; features of activism: 332 – 35; new perspectives for: 355 – 56; finds reasons: 404 – 05; some facts: 405 – 06; varies stance: 408 – 12; 'distinguishes' cases: 412 – 13; demands proof from executive, then lets go: 415 – 24; need to demand reports on compliance: 428 – 32; judgments requiring repeated clarifications: 432 – 40; sidesteps facts: 445, 457 – 59; contrary interpretations of judgments by: 460 – 65, 465 – 84

Juggernaut: 165 – 66, 338 – 39

Kalelkar, Kakasaheb: Nehru on setting up of commission: 6 – 7; letter forwarding report: 343

Kapadia, SH: 484

Kapur, Devesh: 470 – 71, 475 – 76

Karunanidhi, K: 98 – 99

Kashyap, Subhash: 334

Kasliwal, NM: noteworthy dissent of: 391, 405

Kerala: what it did in regard to court orders on creamy layer: 157 – 61

Khan, Ahmad Hasan Khan: 74 – 75

Khanna, HR: warns against dilution of equality: 113 – 14; warns against overdoing classification: 114 – 15; waiving minimum qualifications impermissible: 266; on real question: 352 – 53

Krishna Iyer, VR: against caste-based classification: 148 – 49; better off among reservationists hog benefits, doing double injury: 149 – 150; reverses himself: 150; administration runs for good government not to provide jobs to harijans: 169; rationalizes relaxation of standards: 170; inserts 'substantially': 176-77; endorses construction to disregard 50 per cent limit: 182; enlarges right to promotion through reservations: 191 – 92; order in Mrs Indira Gandhi's case: 200 – 03; dismisses basic structure consideration: 213-14; contrasts between two judgments of: 217 – 26; Backward Castes not castes!: 225 – 26; growth is the answer, but: 227 – 29; advocates militant joint action: 229; midgetry not in country's interest: 274 – 75; how Constitution must be construed: 287 – 89; selective activism: 296 – 301; ultimate argument for activist interpretation: 301 – 03; 'heart' as important as high scores: 413 – 14

Kuldip Singh: on Mandal Commission: 92 – 95; reasons for means test and hiving off creamy layer: 137 – 38; caste-based classification violates secularism, foments casteism: 144 – 45; another reason reservations in promotions unconstitutional: 197; noteworthy dissent of: 393 – 94,405

Lacey WG: 74

Lal,KS: on lower castes and tribes under Islamic rule: 64 – 67

Limit of 50 per cent: Constitution amended to continue 69 per cent: 10 – 11; Ambedkar's illustration: 167; indicated in a general way for educational institutions: 167,172 – 75; becomes ineluctable minimum in services: 168; from 50 per cent at entry to 50 per cent of total service: 168 – 69; VR Krishna Iyer inserts 'substantially': 176 – 77; O Chinnappa Reddy, Fazl Ali, R Pandian dismiss limit: 180 – 81, 183; ES Venkataramaiah that court has not set limit aside: 182 – 83; PB Sawant refrains from dismissing limit: 183 – 84; 'even 100 per cent' : 212 – 13; no sanctity of: 393; must hold: 394; not to be carried forward: 395 – 96; Constitution amended to allow carry forward: 12 – 13, 398 – 99

Macauliffe, M: on 'advantages of Sikh religion to State': 29 – 30

Mahavakyas: high-caste/low-caste differentiation incompatible with: 68

Malik, Sumeet: 422 – 23

Mandal Commission: assumptions to get to 52 per cent: 36 – 37; 1931 census as basis: 37; identification of backward castes: 85 – 96; little response to its queries: 86 – 88; its farcical survey: 88 – 90, 93; inadequacy of results of survey: 90 – 91; expert's account of its survey: 91 – 92; Biju Patnaik on its enumeration: 92; on how 'Backwards' oppress harijans: 100 – 01; manner of referring to Scheduled Caste member: 101-103

Mangalori, Tufail Ahmad: 28

Manusmriti: a description of today's India?: 67 – 68,329

Mathew, KK: justifies 'any measure' that would ensure adequate representation: 170 – 71; hence rationalizes relaxed standards: 170 – 71; 'reasoning' pricked by RM Sahai: 181 – 82; reads equality of outcomes into that of opportunity: 207 – 08

'Matters relating to employment' : stretched to justify reservations in promotions: 188

Maxwell, Sir Reginald: 82 – 86

Mea culpa: 406 – 07

Medical colleges: repeated clarifications of judgments on reservations in: 432 – 37

Medical examinations: doubtful compliance with court orders: 429 – 31

Mehta, Pratap Bhanu: 470 – 71,47576

Merit: 'an Aryan conspiracy': xi; questioned and belittled: xii-xiii; VR Krishna Iyer pooh-poohs: 217 – 24; examinations alleged to be poor indices of: 220 – 21, a camouflage for perpetuating oppression: 231 – 37; won't be affected: 245 – 46; distinguished from competence: 247; assessors denounced as perverse: 247,49; sacrifice of, necessary price that has to be paid: 269; won't be affected: 276 – 77; pushed away: 341 – 42; heart more important: 413 – 15; is context specific: 453 – 54; its debasement institutionalized: 419 – 20,423 – 24

Minority institutions: anomalies arising from 'strict constructionist' interpretations of Articles 29,30:391,411

Minto, Lady: entry in diary: 28

Minto, Lord: manoeuvre to introduce separate electorates to wean Muslims away: 26 – 29

Morley, John: 28

Mullan, CS: 72

Muslims: Andhra government decrees reservations for: 3; Committee to rationalize reservations for: 3 – 4; order to count, in armed forces: 3; Constituent Assembly rejects reservations for: 4 – 6; separate electorates for: 25 – 29; J&K reservations for, struck down: 117 – 18; court's formulations for OBCs applied to Muslims: 154 – 55; reservations that have crept in: 336; promises to extend reservations to: 336 – 37; 'legal' ground prepared for reservations for: 337 – 38; not a homogeneous class: 370 – 71, 377 – 78; reservations in Andhra for: 369 – 80; thrice struck down by high court: 370 – 86; Supreme Court refuses stay: 386 – 87; Supreme Court stays: 388, 418-19

Nagaraj, M: data on Karnataka departments: 457 – 59

Naik, LR: on how 'Backwards' oppress Scheduled Castes: 10103

Natarajan, D: 86

Natesan, Vellapalli: 361

Nehru, Pandit Jawaharlal: on disaster that will follow folly of reservations: ix-x; seconds rejection of communal reservations: 5 – 6; against reservations except temporarily for Scheduled Castes: 5 – 7; standard version on 1857: 25; was he excluded through an examination?: 221; invoked out of context: 237

New Indian Express, The: 361 'Non-issue': 290 – 91

Occupation: why casteists will not allow its adoption for classification: 42 – 43

'Only', in Articles 15, 16: 110 – 113

Olson, Mancur: 345

Overarching principles: as touchstones of basic structure: 446 – 51, 469 – 70, 485 – 89

Pal, Ruma: on breakdown of judicial discipline: 467 – 68

Pandian, Ratnavel: uses a local snippet of 1932 to describe India of today: 61 – 62; criterion for continuance of caste-based reservations: 62 – 63; hyperbolic descriptions of privation: 104 – 05; dubitable reasons for rejecting means test: 139 – 41; dismisses 50 per cent limit: 183; denounces standards as perverse: 246 – 47

Pasayat, Arijit: reservations decreed without data: 416 – 17; ill effects of caste-based reservations: 426 – 28

Patel, Sardar Vallabhbhai: on rejecting communal reservations: 4 – 5; caste enumeration to be abandoned: 86

Patnaik, Biju: on Mandals enumeration: 92

Planning Commission: 347 – 48

Political class: primarily responsible: 10 – 22, 335, 347-49; overturns judgments: 3 – 22, 389 – 497; its sway and effects: 389 – 403, 403 – 05

Porter, AE: 70 – 71

Postgraduate courses: reservations in, sanctioned though fall foul of court's own reasoning: 268 – 72

'Posts': stretched to justify reservations in promotions: 188 – 90

Prasad, Rajendra: on manoeuvre to bring in separate electorates: 25

Private unaided educational institutions: Constitution amended to ensure reservations in: 15 – 22,389 – 91; judgments require repeated clarifications: 437 – 40; Army College of Medical Sciences to be treated as any other: 465 – 77

Promotions, reservations in: Constitution amended to allow: 12,398; words ‘matters relating to employment,’ and ‘posts’ stretched to justify: 188 – 90; ‘an incident of employment’: 191 – 92; eight of eight judges hold against: 193 – 99; do their reasons evaporate?: 199200; compromise on: 197 – 99; progressives prevail: 204 – 06; reservations in higher posts not in nation’s interest: 272; ‘Court decided a non-issue’: 290 – 91; glimpses of situation that has been wrought: 312 – 23; court holds against: 395; court legitimizes: 397 – 98; effect of roster system, consequential seniority on: 396 – 97,457 – 59

Radhakrishnan, S: 263

Railways: orders that led to writ: 217 – 18

Rajasthan: reservationists form 80 to 90 per cent of teachers recruited: 178

Rajshekhar, VT: merit an Aryan conspiracy: xi-xii Rajya Sabha: Standing Committee on Home Affairs, report: 253 – 55

Ramaswamy, K: invokes propagandist: xi-xii; denounces assessors as biased and worse: 248 – 49

Rane Commission: on race to be recognized ‘Backward’: 7880; for adoption of economic criteria: 80 – 81

Rangachari, TCA: 475

Rao, Subba: on caste-based identification: 116 – 17; can exceed 50 per cent with carry forward: 179

Raveendran, RV: ill effects of caste-based reservations: 426,428

Ray, AN: promotion an incident of service: 191; simultaneously, efficiency of administration is of paramount importance: 191; Scheduled Castes not castes: 226

Reality: argument that ‘caste is a reality’ examined, are religion, language, race, sex not ‘realities?’, asks RM Sahai: 146

Reddy, BP Jeevan: on unchanging nexus: 60 – 61; classification can only be on basis of caste as every Hindu has a caste!: 141 – 42; reasons why OBCs need not be akin to SCs/STs: 152; allows that creamy layer be hived off but places bar so high as to leave everyone in: 153 – 54; invokes VP Singh’s speech: 243 – 44

Reddy, O Chinnappa: on effects of caste-based reservations: 133; his reasons why ‘caste is class,’ examined: 133 – 37; dodges clear pronouncement: 151 – 52; so what if benefits are being hogged by a few?: 153; dismisses 50 per cent limit: 18081; reads equality of outcomes into that of opportunity: 207 – 08; castigates fellow progressives: 226 – 27; zero-sum view of: 22730; merit just a camouflage for perpetuating oppression: 231 – 37

Reddy, YS: reservations for Muslims decreed, farcical ‘surveys’ organized by government headed by: 369 – 86

Religion: sole basis for reservations decreed in Andhra: 370 – 72,37576,381

Representation: adequate, 392, 394 – 95; proportional: 398; effects of permissive amendments and decisions: 397 – 98; not observed in Andhra decrees: 373

Representation: effects of reservations on: 324 – 25

Reservations, possible boons from: judges’ hyperbole on: 470 – 76

Roy-Burman, BK: on Mandals survey: 91 – 92

Sachar Committee: to rationalize reservations for Muslims: 3 – 4

Sahai, RM: on irrelevance of some indicators: 68; on Mandal Commission's identification of castes: 95 – 96; on how castes continue as 'Backward': 10305; on 'only' in Articles 15, 16: 111 – 12; alternate route to identification: 142 – 43; Constitution uses 'class' not 'caste': 145 – 46; explodes alibi of 'reality': 146; on invoking on American judgments in face of our Constitution: 146; Article 16(4) not for making reparations for historical wrongs: 152; pricks 'reasoning' of Fazl Ali and KK Mathew: 181 – 82

Saikia, Hiteswar: 360

Salve, Harish: 267 – 68

Sawant, PB: on caste-based stratification of Indian society and state: 63 – 64; on why creamy layer should be hived off, but not solely by means test, puts bar so high as to render it ineffective: 138 – 39; as discrimination has been on basis of caste, remedy must be on basis of caste!: 14344; refrains from overturning 50 per cent limit: 183 – 84; reasons for not having reservations in promotions: 193 – 99; ambivalent proposal: 198; invokes Pandit Nehru: 237; examinations not an index of suitability: 238 – 39; his arguments on teaching applied to governance: 239 – 42; Article 16(4) for sharing power: 244; 'Backwards' are 77 1/2 per cent of population: 244; shifts argument as universal franchise transfers power to 'Backwards': 244 – 45

Sen, Amartya: 453

Sen, AP: urges alternatives to caste-based identification: 124 – 25; cautions against undermining other values by excesses in name of equality: 179; Constitution talks of 'adequate,' not proportional representation in services: 17980; on consequences of pushing protective discrimination: 266 – 67

Separate electorate for Muslims: manoeuvre by which introduced: 25 – 29; consequences of: 29

Separate electorate for Scheduled Castes: from Round Table Conference to Yeravda Pact: 31 – 33

Services: effect of roster and consequential seniority: 445, 457 – 59; contrasting assessments of effect on morale of: 420 – 22, 462 – 63

Seshadri, HV: on manoeuvre to bring in separate electorates: 25

Shah, Ghanshyam: 104

Sharma, Arvind: 350

Sharma, Shashi S: 68

Shiva Rao, B: 111

Shivaji, Chhatrapati: his caste!: 65

Shoobert, WH: 72 – 73, 77

Singh, VP: 'What is merit?' speech: 243 – 44

Sinha, AN: Institute of Social Studies: 149

Smith, Conran: 83 – 84

Smith, WC: on consequences of separate electorates: 29; his words transposed to caste-based reservations: 33

'Socialist, Secular': in Preamble: 393, 441 Socialism: for the masses!: 279

Society: log-jam in: 344 – 46

Solutions, partial: multiply good educational institutions: 31112; its limitation: 312; which way to help disadvantaged?: 343 – 44; refashioning assistance: 349 – 55, 363 – 64; reorienting judicial perspectives: 356 – 57; need to organize: 356 – 57; new constitutional structure: 357; altered discourse: 363 – 66, 489 – 90

Sorley, HT: 71 – 72

Specialities: reservations in, against nation's interest: 272 – 75; what is not a speciality?: 273,341; how court disregards: 273 – 74

Sri Narayana Guru: 361

Standards: Constitution amended to dilute: 13; relaxation rationalized: 169; standard must come down to candidates!: 169 – 72; relaxation of standards becomes granting preference: 171; 50 per cent limit construed to ensure representation to those who are by definition not qualified: 184 – 86; VR Krishna Iyer scoffs at apprehensions of falling: 217 – 24; dubbed 'artificial': 245 – 46; denounced as perverse: 246 – 47; dilutions in, listed: 253 – 54; legal opinion on diluting: 255 – 56; completely waived: 262 – 65,267 68; not candidates but criteria on test: 285 – 87; diluted: 392 – 93; 'heart' as important as: 413 – 15; 'State is best judge of: 419 – 24

State structure: fractured: 342 – 43; paralysed: 344 – 46

Supersessions, in services: 312 – 25; their ill effects: 313 – 15,445,45759; contrasting assessments in judgments: 421 – 22,462

Tamil Nadu: Constitution amended to accommodate 69 per cent law: 10 – 11; 'Most Backward Castes' -how 'identified': 98 – 99; Supreme Court's interim orders for 11 years: 203

Tarkunde, VM: Memorial Lecture: 467 – 68

Temporizing: on reservations in promotions: 197 – 99; wages of, illustrated by Mrs Indira Gandhi's election case: 200 – 03; general feature: 203 – 04

Thakker, CK: reservations decreed without data: 416 – 17; ill effects of caste-based reservations: 426 – 28

Theseus, ship of: Constitution as the: 481 – 84

Thommen, TK: descriptions do not fit 'Backwards': 104 – 05; implication of categories he includes among 'Backwards': 242 – 43

Tully, Mark: 350

Turner, AC: 70

University Education Commission: 263

Vaidyanathan, R: 351

Varma, DSR: portentous reasoning on Andhra reservations for Muslims: 385 – 86

Venkatachaliah Commission: 334

Venkatachari, Sanjay: 388

Venkataramaiah, ES: strained history: 127 – 30; his reasons examined: 130 – 31; advocates restricting reservations to those OBCs whose condition akin to SCs/STs: 132; on 50 per cent limit not having been set aside by court: 182 – 83

Venkataswamy Commission: 98, 104

Venkatesan, J: 203

Venugopal, KK: 222

Violence: as ultimate argument for activist jurisprudence: 301 – 03

Wanchoo, KN: on 'posts' in Article 16(4): 189 – 90

Women: changes in position of: 53 – 54

Yadav, Shyamlal; 430 – 31

Yeatts, MWM: 44 – 45, 50, 59, 76 – 77, 82 – 86

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About the Author

Scholar, author, former editor and minister, Arun Shourie is one of the most prominent voices in our country's public life and discourse.

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What this essay is about

- 1 *Ashok Kumar Gupta v. State of U.P.*, (1997) 5 SCC 201, at 231, para 35.
- 2 V.T. Rajshekhar, *Merit, my foot. A reply to Anti-Reservation Racists*, Dalit Sahitya Academy, Bangalore, 1996.
- 3 *K.C. Vasanth Kumar v. State of Karnataka*, 1985, Supp. SCC 714 at 737–40, paras 33, 36.1 am just citing a few representative lines from the judgment here, and shall take it up for examination later.
- 4 Unless indicated otherwise, words have been italicized by me.

1. Blowing up every dyke

- 1 *Constituent Assembly Debates*, Volume VIII, 26 May 1949, pp. 329 – 32.
- 2 Jawaharlal Nehru, *Letters to Chief Ministers, 1947 – 64*, Volume I, 1947 – 49, 3 June 1949, p. 363.
- 3 *Ibid.*, Volume III, 1952 – 54, 18 March 1953, pp. 270 – 71.
- 4 *Jawaharlal Nehru's Speeches, 1953 – 1957*, Publications Division, New Delhi, 1958, p. 459.
- 5 *The State of Madras v. Smt. Champakam Dorairajan*, AIR (1951) SC 226.
- 6 (1996) 6 SCC 580.
- 7 (1995) 6 SCC 684.
- 8 (1996) 2 SCC 715.
- 9 (2002) 8 SCC 481.
- 10 (2003) 6 SCC 697.
- 11 (2005) 6 SCC 537.
- 12 *P.A. Inamdar*, op. cit., at 603, para 134.
- 13 *P.A. Inamdar v. State of Maharashtra*, op. cit., at 601, paras 124, 125.
- 14 *The Indian Express*, 5 April 2006.
- 15 *The Asian Age*, 14 April 2006.

2. A fundamental lesson

- 1 Published in 1941, the book argues the case for Partition on the ground, among others, that, as an ideology, Islam makes it impossible for Muslims to coexist with others in a multi-religious, multicultural country.
- 2 The primary documents are cited in Rajendra Prasad's important work, *India Divided*, 1945/46, pp. 112 – 15, and are recalled in the Bharatiya Vidya Bhavan series *The History and Culture of the Indian People*, in particular in Volume X, Part 2, pp. 32025, and Volume XI, pp. 127 – 30, 147 – 49. See also, H.V. Seshadri, *The Tragic Story of Partition*, Jagrana Prakshan, Bangalore, 1984, pp. 35 – 43.
- 3 Har-Anand Publications, New Delhi, reprint, 1993. For the following, see in particular, pp. 82 – 85.
- 4 Wilfred Cantwell Smith, *Modern Islam in India*, Second Revised Edition, 1946, reprint, Usha Publications, New Delhi, 1979, p. 216.
- 5 For a glimpse of the manoeuvre, see, *Census of India, 1911, Volume I, Part I, Report*, pp. 116 – 17, para 155; and *Census of India, 1911, Volume VII, Bombay, Part I Report*, pp. 55 – 56, para 113. The protests continued for long, and were finding echoes in the Central Legislative Assembly even three decades later: see, for instance, Home Department Files, F. 122/29-Public, F. 45/30/30-Public 1930, F. 45/46/30-Public.

- 6 On all this, see, my *Missionaries in India, Continuities, Changes, Dilemmas*, ASA, New Delhi, 1994, pp. 182 – 99; H.V. Seshadri, *The Tragic Story of Partition*, Jagrana Prakshan, Bangalore, 1984, pp. 35 – 43.
- 7 The chain of events is described in my *Worshipping False Gods: Ambedkar, and the facts that have been erased*, ASA, New Delhi, 1997.

3. The very thing that was shunned becomes central

- 1 *State of Andhra Pradesh v. P. Sagar*, AIR 1968 SC 1379, paras 9,10.
- 2 *Census of India, 1931, Volume I, India, Part I, Report*, Manager of Publications, Delhi, 1933, p. 425.
- 3 *Ibid.*, p. 430.
- 4 *Ibid.*, pp. 430 – 31.
- 5 *Ibid.*, pp. 430,432.
- 6 *Ibid.*, p. 432.
- 7 *Census of India, 1931, Volume I, India, Part II, Imperial Tables*, Manager of Publications, Delhi, 1933, p. 521.
- 8 *Census of India, 1931, Volume I, India, Part I, Report*, Manager of Publications, Delhi, 1933, p. 433.
- 9 *Census of India, 1931, Volume I, India, Part II, Imperial Tables*, Manager of Publications, Delhi, 1933, p. 521; also *Part I*, op. cit., pp. 432 – 33.
- 10 M.W.M. Yeatts, *Census of India, 1931, Volume XIV, Madras, Parti, Report*, Government of India Central Publication Branch, Calcutta, 1932, p. 345. In this section, sources are indicated by province and page number. Each of them refers to the 1931 census volume for the province concerned. The publication details are as follows: J.H. Hutton, *Census of India, 1931, Volume I, India, Part I, Report*, Manager of Publications, Delhi, 1933; CS. Mullan, *Census of India, 1931, Volume III, Assam, Part I, Report*, Central Publication Branch, Government of India, Shillong, 1932; A.E. Porter, *Census of India, 1931, Volume V, Bengal and Sikkim, Part I, Report*, Central Publication Branch, Government of India, Calcutta, 1933; W.G. Lacey, *Census of India, 1931, Volume VII, Bihar and Orissa, Part I, Report*, Superintendent Government Printing, Patna, 1933; W.H. Short, *Census of India, 1931, Volume XII, Central Provinces and Berar, Part I, Report*, Government Printing, CP, Nagpur, 1933; M.W.M. Yeatts, *Census of India, 1931, Volume XIV, Madras, Part I, Report*, Central Publication Branch, Government of India, Madras, 1932; A.H. Dracu and H.T. Sorley, *Census of India, 1931, Volume VIII, Bombay Presidency, Part I, General Report*, Government Central Press, Bombay, 1933; A.C. Turner, *Census of India, 1931, United Provinces of Agra and Oudh, Part I, Report*, Civil and Military Gazette Press, Lahore, 1933; Khan Ahmed Hasan Khan, *Census of India, 1931, Volume XVII, Punjab, Part I, Report*, Central Publication Branch, Government of India, Calcutta, 1933; Satya V. Mukerjea, *Census of India, 1931, Volume XIX, Baroda, Part I, Report*, Times of India Press, Bombay, 1932; M. Venkatesa Iyengar, *Census of India, 1931, Volume XXV, Mysore, Part I, Report*, Government Press, Bangalore, 1932; Gulam Ahmed Khan, *Census of India, 1931, Volume XXIII, H.E.H. The Nizam's Dominions (Hyderabad State), Part I, Report*, Government Central Press, Hyderabad-Deccan, 1933; B.L. Cole, *Census of India, 1931, Volume XXVII, Rajputana Agency, Report and Tables*, Saraswati Press for Government of India, Meerut, 1932; Anant Ram and Hira Nand Raina, *Census*

of India, 1931, Volume XXIV, Jammu and Kashmir State, Part I, Report, Ranbir Government Press, Jammu, 1933.

- 11 *Punjab*, pp. 323 – 24.
- 12 *Bombay*, p. 379.
- 13 *Mysore*, pp. 319 – 20.
- 14 *Bengal and Sikkim*, pp. 421, 428, 429, 431 – 32.
- 15 *Central Provinces and Berar*, pp. 365, 392; *Rajputana Agency*, pp. 126 – 27.
- 16 *Rajputana Agency*, p. 123.
- 17 *Bihar and Orissa*, pp. 265 – 66.
- 18 *Assam*, pp. 209 – 10.
- 19 *Madras*, p. 339.
- 20 *Baroda*, pp. 409 – 10.
- 21 *Madras*, pp. 332 – 33.
- 22 *Madras*, p. 336.
- 23 *Baroda*, p. 411.
- 24 *Assam*, pp. 202, 206 – 07, 213.
- 25 *Ibid.*, p. 202.
- 26 *Central Provinces and Berar*, p. 387.
- 27 *Central Provinces and Berar*, pp. 352 – 53, 394; *Jammu and Kashmir*, p. 312; *Mysore*, p. 328.
- 28 *Bihar and Orissa*, p. 270. *The italics are mine, but one feels that the author would not have it otherwise.*
- 29 *Mysore*, p. 329; *Baroda*, p. 410.
- 30 *Central Provinces and Berar*, p. 366; *Mysore*, pp. 330 – 32; *Bombay*, p. 381.
- 31 *H.E.H. The Nizam's Dominions (Hyderabad State)*, p. 247.
- 32 *Rajputana Agency*, p. 123.
- 33 *Jammu and Kashmir*, pp. 312 – 13.
- 34 *Mysore*, p. 329.
- 35 *Bihar and Orissa*, p. 266.
- 36 *Punjab*, p. 324.
- 37 *Baroda*, pp. 409 – 10.
- 38 *Baroda*, p. 412.
- 39 *Bihar and Orissa*, pp. 266 – 67.
- 40 *Madras*, pp. 332 – 33.
- 41 *Assam*, pp. 202 – 03.
- 42 *Indra Sawhney v. Union of India*, (1992) Supp. (3) SCC 217, at 714 – 15, para 779.
- 43 *Indra Sawhney*, op. cit., at 389, para 102.
- 44 *Ibid.*, at 389, para 103.
- 45 *Indra Sawhney*, op. cit., at 390, para 104.
- 46 *Ibid.*, at 502, para 399.
- 47 *Indra Sawhney*, op. cit., at 503, paras 398 – 400.
- 48 K.S. Lal, *Growth of Scheduled Castes and Tribes in Medieval India*, Aditya Prakashan, New Delhi, 1995. For related material, see also his, *The Legacy of Muslim Rule in India*, Aditya Prakashan, 1992, and *Muslim Slave System in Medieval India*, Aditya Prakashan, 1994.
- 49 *Ibid.*, pp. 120 – 25.

- 50 Cf, Shashi S. Sharma, *Imagined Manuwad, The Dharmasastras and their Interpreters*, Rupa, Delhi, 2005. For evidence of the hollowness of their assertions in their own words, see, for instance, my *Eminent Historians, Their technology, their line, their fraud*, ASA, New Delhi, 1998.
- 51 *Indra Sawhney*, op. cit., at 611, para 603.

4. The race then, and the one now

- 1 *Census of India, 1921, Volume I, Part I*, op. cit., p. 223.
- 2 *United Provinces of Agra and Oudh*, pp. 528 – 32.
- 3 *Bengal and Sikkim*, pp. 425 – 28.
- 4 *Bombay*, pp. 382, 398 – 99.
- 5 *Assam*, p. 203.
- 6 *Central Provinces and Berar*, pp. 353 – 54.
- 7 *Rajputana Agency*, p. 123.
- 8 *Jammu and Kashmir*, pp. 310 – 12.
- 9 *Baroda*, pp. 394 – 96.
- 10 *Bihar and Orissa*, pp. 263 – 64.
- 11 *Punjab*, pp. 322 – 24.
- 12 *H.E.H. The Nizam's Dominions*, p. 246.
- 13 *Mysore*, pp. 315 – 19.
- 14 *Madras*, p. 334.
- 15 *Madras*, pp. 334 – 35.
- 16 *Central Provinces and Berar*, pp. 368 – 69.
- 17 *Bengal and Sikkim*, p. 425.
- 18 See, for instance, *Assam*, pp. 207, 218; *Bengal*, p. 425; *Central Provinces and Berar*, p. 355; *Bihar and Orissa*, pp. 268 – 69.
- 19 Headed by Justice C.V. Rane, former judge of the high court, the commission was set up in April 1981.
- 20 Government of Gujarat, *Report of the Socially and Educationally Backward Classes (Second Commission)*, Volume I, Government of Gujarat, 1983; in particular pp. 47 – 48, 52 – 54, 67 – 68, 107 – 08, 113 – 14. See also, *K.C. Vasanth Kumar v. State of Kamataka*, (1985) Supp. SCC 714, at 732 – 33, para 24.

5. The nebulous made solid

- 1 Sir Reginald is the one who, along with the additional secretary, Sir Richard Tottenham, manoeuvred to defeat the Quit India movement. He is the one with whom RC. Joshi, the then general secretary of the Communist Party of India, had those secret meetings, with whom the communists struck that secret understanding to sabotage the Quit India movement, and to whom they submitted their reports about what useful work they had done to accomplish that task. The manoeuvres are documented in my *Worshipping False Gods*, ASA, New Delhi, 1997; and “*The Only Fatherland*”, *Communists, 'Quit India' and the Soviet Union*, ASA, New Delhi, 1991.
- 2 National Archives, File 1/1/39-Public.
- 3 National Archives, File 45/9/40-Public.
- 4 National Archives, File 45/9/40-Public.

- 5 For the preceding, *Census of India, 1941, Volume I, India, Part II, Administration Report*, Manager, Government of India Press, Simla, 1942, pp. 20 – 21.
- 6 D. Natarajan, *Indian Census Through Hundred Years*, Office of the Registrar General, India, Ministry of Home Affairs, New Delhi, 1972, pp. 265 – 66.
- 7 *The Indian Express*, 31 August 1990.
- 8 Cf, *Indra Sawhney v. Union of India*, (1992) Supp. (3) SCC 217, at 500, para 394.
- 9 *Indra Sawhney*, op. cit., at 599 – 602, paras 585 – 87.
- 10 *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217, at 609, para 601.
- 11 Examples of such hyperbole can be multiplied endlessly. These few phrases are from the judgments of Justices Pandian and Thommen in *Indra Sawhney*, op. cit., at 361,446,454; paras 3 – 4,280,295.

6. And how has the court come to accept all this?

- 1 See, *State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226; and *B. Venkataramana v. State of Madras*, AIR 1951 SC 229.
- 2 See, *Indra Sawhney v. Union of India*, (1992) Supp. (3) SCC 217, at 662 – 66, paras 695 – 97.
- 3 See, *State of Andhra Pradesh v. U.S. V. Balram*, (1972) 1 SCC 660, at 681,686, paras 70,83-A.
- 4 And this rationalization is quoted for fortification by the majority judgment in *Indra Sawhney*. Cf, *Indra Sawhney*, op. cit., at 670, para 710.
- 5 *State of Andhra Pradesh v. U.S. V. Balram*, (1972) 1 SCC 660, at 686, 689, paras 87,
- 6 *Minor P. Rajendran v. State of Madras*, (1968) 2 SCR 786, para 7. And that becomes authority in *State of Andhra Pradesh v. P. Sagar*, 1968 AIR 1379; and that becomes redoubled authority in *State of Andhra Pradesh v. U.S.V. Balram*, 1972 SCC (1) 660; and that becomes conclusive authority in *KG Vasanth Kumar v. State of Karnataka*, (1985) Supp. SCC 714, at 752 – 54, para 59.
- 7 See, for instance, *Indra Sawhney*, op. cit., at 669, para 706.
- 8 B. Shiva Rao, *The Framing of India's Constitution, A Study*, Indian Institute of Public Administration, New Delhi, 1968, p. 187.
- 9 *Basu's Commentary on the Constitution of India, Volume B, Articles 14 – 19*, Sixth Edition, S.C. Sarkar, Calcutta, 1975, p. 295.
- 10 *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217, at 602–04, paras 589 – 92.
- 11 *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310, at 397, para 210.
- 12 (1960) 2 SCR 311; AIR 1960 SC 384.
- 13 *State of Kerala v. N.M. Thomas*, op. cit., at 395 – 96, para 208.
- 14 *Ibid.*, at 398, paras 211,212.
- 15 *K.C. Vasanth Kumar v. State of Karnataka*, AIR (1985) Supp. SCC 714, at 725, 729, paras 7,20.
- 16 *State of Madras v. Champakam Dorairajan*, AIR (1951) SC 226.
- 17 *M.R. Balaji v. State of Mysore*, AIR (1963) SC 649.
- 18 *Chitralkha v. State of Mysore*, AIR (1964) SC 1823, at 1832 – 34, in particular paras 14 – 21.
- 19 *M. Periakaruppan (Minor) v. State of Tamil Nadu*, (1971) 1 SCC 38, at 46 – 47, para
- 20 *Ibid.*, at 49, para 29.
- 21 <http://www.hinduonnet.com/thehindu>; 24 April 2006.

- 22 *Akhil Bharatiya Soshit Karamchari Sangh (Railway) v. Union of India*, (1981) 1 SCC 246, at 264, para 22.
- 23 *State of Andhra Pradesh v. U.S.V. Balram*, (1972) 1 SCC 660, at 685 – 86, para 83.
- 24 *Janki Prasad Parimoo v. State of J&K*, (1973) 1 SCC 420, at 434, 438 – 40, paras 22, 24, 34 – 36.
- 25 *KG Vasanth Kumar v. State of Karnataka*, AIR (1985) Supp. SCC 714, at 769 – 70, paras 82, 84.
- 26 *Ibid.*, at 729, 731, paras 20, 22.
- 27 *Ibid.*, at 733 – 35, paras 25, 28.
- 28 *Ibid.*, at 732, para 24.
- 29 *Ibid.*, at 733 – 36, paras 25, 30, 31.
- 30 *Ibid.*, at 723, para 2.
- 31 *K.C. Vasanth Kumar v. State of Karnataka*, op. cit., at 787 – 95, paras 110 – 19.
- 32 For a summary account, see Shiva Rao, *The Framing of India's Constitution, A Study*, Indian Institute of Public Administration, New Delhi, 1968, pp. 192 – 200.
- 33 (1975) 1 SCC 267.
- 34 *K.C. Vasanth Kumar v. State of Karnataka*, op. cit., at 796, 799 – 800, paras 122, 128 – 31.
- 35 *Ibid.*, at 807 – 08, paras 142, 143.
- 36 *K.C. Vasanth Kumar v. State of Karnataka*, op. cit., at 736, para 32.
- 37 *Ibid.*, at 742, para 40.
- 38 *Ibid.*, at 748, para 52.
- 39 *Ibid.*, at 748, para 51.
- 40 *Ibid.*, at 768, para 79.
- 41 *Ibid.*, at 769, para 79.
- 42 *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217, at 492, para 385.
- 43 *Ibid.*, at 539, para 484.
- 44 *Ibid.*, at 553 – 54, paras 520 and 522.
- 45 *Ibid.*, at 418, para 207.
- 46 *Ibid.*, at 665, para 699.
- 47 *Ibid.*, at 708, para 770.
- 48 *Ibid.*, at 716, para 782.
- 49 *Ibid.*, at 612 – 15, paras 605 – 09.
- 50 For instance, *ibid.*, at 393, para 117.
- 51 *Ibid.*, at 511, para 418.
- 52 *Indra Sawhney v. Union of India*, 1992 Supp (3) SCC 217, at 475, para 350.
- 53 *Ibid.*, at 589, para 574.
- 54 *Ibid.*, at 591, para 576. The 'Black' and 'Brown' refer to cases of foreign courts which many progressive judges had been invoking in season and out.

7. Two fundamental questions

- 1 See, for instance, *Chattar Singh v. State of Rajasthan*, (1996) 11 SCC 742, at 749 – 51, paras 17 to 19.
- 2 For instance, *Janki Prasad Parimoo v. State of Jammu and Kashmir*, (1973) 1 SCC 420, at 434, para 25.

- 3 *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310, at 370, para 143. Experience since then, of course, indicates that he was too sanguine in his expectation that, given this restriction, ‘we may readily hold that casteism cannot come back by the back door.’
- 4 *K.C. Vasanth Kumar v. State of Karnataka*, (1985) Supp. SCC 714, at 730, para 21.
- 5 *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310, at 363, para 124.
- 6 *Ibid.*, at 373, para 149.
- 7 *Akhil Bharatiya Soshit Karamchari Sangh (Rly.) v. Union of India*, (1981) 1 SCC 246, at 297 – 98, paras 92,94.
- 8 *Indra Sawhney*, op. cit., for instance, at 523, 720, paras 447, 788.
- 9 (1985) Supp. SCC, 714, at 747 – 48, para 51.
- 10 *Indra Sawhney*, op. cit., at 725, 766, paras 794, 859.
- 11 For Justice Sawant on this, *Indra Sawhney*, op. cit., at 523, para 447.
- 12 *Indra Sawhney*, op. cit., at 606, para 595.
- 13 *K.C. Vasanth Kumar v. State of Karnataka*, 1985 Supp SCC 714, at 763, para 72.
- 14 *Indra Sawhney*, op. cit., at 724, para 792.
- 15 There are manifest problems with the formulation that the court adopted even in *Indra Sawhney*. They will take us far from our current concern. Hence, I note them here just in passing. For one thing, there are substantial differences over what criteria should be used to identify the ‘creamy layer’. Four of the judges in the case held that the layer should be identified by economic measures, adding, however, that individuals and groups exceeding the prescribed limit should not be excluded unless they are economically so much better off that the level of their advance has resulted in their social advancement. One judge, Justice Sawant, as we have seen, made the test even more stringent: he maintained that no group should be excluded until it has acquired the social capacities to compete with the classes that are forward. Even such differences can come in handy for those who would want to push *Indra Sawhney* in a still more populist direction. But there are in addition formulations that can give rise to more basic problems. Consider two representative passages on the question at hand. The court declares: A caste can be and quite often is a social class in India. If it is backward socially, it would be a backward class for the purposes of Article 16(4). Identification of the backward classes can certainly be done with reference to castes among, and along with, other groups, classes and sections of people. One can start the process with the castes, wherever they are found, apply the criteria (evolved for determining backwardness) and find out whether it satisfies the criteria. If it does – what emerges is a ‘backward class of citizens’ within the meaning of and for the purposes of Article 16(4). Similar process can be adopted in the case of other occupational groups, communities and classes, so as to cover the entire populace. The central idea and overall objective should be to consider all available groups, sections and classes in society. Since caste represents an existing, identifiable social group or class encompassing an overwhelming majority of the country’s population, one can well begin with it and then go to other groups, sections and classes. The court elaborated this as follows:
.....while answering Question 3(b), we said that identification of backward classes can be done with reference to castes along with other occupational groups, communities and classes. We did not say that that is the only permissible method. Indeed, there may be some groups or classes in whose case caste may not be relevant to all. For example, agricultural labourers, rickshaw-

pullers/drivers, street-hawkers etc. may well qualify for being designated as Backward Classes. [Ibid., at 185, paras 11 – 12.]

Transpose the words to the case of a religious group, say, Muslims. How then are they less qualified to be a backward class deserving reservations *as Muslims*?

16 Ibid., paras 784,790 – 93, and paras 843 – 44.

17 *Indra Sawhney v. Union of India*, (2000) 1 SCC168, at 185, para 10.

18 Ibid., at 209, para 90.

19 *Indra Sawhney-II*, paras 29,55,69.

20 (1995) 5 SCC 403.

21 *Indra Sawhney-II*, at 192, para 31.

22 *Indra Sawhney-II*, at 184, para 9.

23 On the preceding, *Indra Sawhney v. Union of India*, (2000) 1 SCC 168, paras 36, 37,41 – 16,85,88 – 93.

24 *State of Uttar Pradesh v. Pradip Tandon*, (1975) 1 SCC 267.

25 *Saurabh Chaudri v. Union of India*, (2003) 11 SCC 146, at 161, para 26.

8. 50 per cent: origin of the figure, its fate, consequences of its fate...

1 *State of Kerala, v. N.M. Thomas*, 1976 2 SCC 310 at 365, para 128.

2 Ibid., at 402, para 227.

3 *K.C. Vasanth Kumar v. State of Karnataka*, (1985) Supp. SCC 714, at 737, para 33.

4 *Constituent Assembly Debates*, 30 November 1946, p. 701.

5 *M.R. Balaji v. State of Mysore*, AIR 1963 SC 649, at 663, para 34.

6 *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310 at 337, para 42.

7 For instance, Justice V.R. Krishna Iyer in *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310 at 357, para 110.

8 Ibid., at 357, para 109.

9 Ibid., at 369, para 140.

10 Ibid., at 341,342,347, paras 58,59, 79,80. Italics in the original.

11 *State of Kerala v. N.M. Thomas*, op. cit., at 343, para 64.

12 Ibid., at 337 – 38, para 44.

13 Ibid., at 346, para 74.

14 *M.R. Balaji v. State of Mysore*, (1963) Supp (1) SCR 439, para 13.

15 Ibid., para 14.

16 Ibid., para 34.

17 *Cf. Akhil Bharatiya Soshit Karamchari Sangh (Rly.) v. Union of India*, (1981) 1 SCC 246, at 298, para 88.

18 Ibid., at 296, para 88.

19 See, for instance, Ibid.,at273–74, paras44, 45.

20 Ibid., at 315, para 135.

21 *State of Punjab v. Hira Lal*, (1970) 3 SCC 567, at 572 – 73; cited in *Akhil Bharatiya Soshit Karamchari Sangh (Rly.) v. Union of India*, op. cit., at 313 – 14, para 132.

22 *T. Devadasan v. Union of India*, AIR 1964 SC 179; in particular, paras 13,15,16, 20.

23 Ibid., in particular, paras 22,23,24,26,27,29,30.

- 24 *K.C. Vasanth Kumar v. State of Karnataka*, (1985) Supp. SCC 714, at 770 – 72, paras 85 to 87.
- 25 Ibid., at 74546,751 – 52, paras 49,57,58.
- 26 *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310, at 387, para 191.
- 27 *Indra Sawhney*, op. cit., at 618, para 614.
- 28 *State of Kerala v. N.M. Thomas*, op. cit., para 143.
- 29 *K.C. Vasanth Kumar v. State of Karnataka*, op. cit., at 810, para 148.
- 30 For instance, *Indra Sawhney*, op. cit., at 735, para 811.
- 31 Ibid., at 411, para 183.
- 32 *Indra Sawhney*, op. cit., at 543, para 495.
- 33 (1982)2 Serv LR 307.
- 34 *R.K. Sabharwal v. State of Punjab*, (1995) 2 SCC 745, para 4.

9. Promotion: just a facet of recruitment!

- 1 On all this, *General Manager, Southern Railway v. Rangachari*, 1962 AIR 36 1962 SCR (2) 586; in particular para 43.
- 2 Ibid., at 596, para 25.
- 3 *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310 at 333,381 – 82, paras 28,29,17176.
- 4 *Akhil Bharatiya Soshit Karamchari Sangh (Rly.) v. Union of India*, (1981) 1 SCC 246, at 270, para 36.
- 5 Ibid., at 274, para 46.
- 6 On the foregoing, *Indra Sawhney v. Union of India*, (1992) Supp. (3) SCC 217, paras 301 – 02,308 – 10,547 – 48, 602,623,635,828 – 29,859.
- 7 *Indira Nehru Gandhi v. Raj Narain*, (1975) 2 SCO 159, in particular, at 160,161, 163,164,170; paras 1,3,4, 8,10,32.
- 8 (1975) Supp. SCC1.
- 9 Cf, J. Venkatesan, ‘Apex Court extends order on extra seats in medicine, engineering,’ *The Hindu*, 8 May 2004.
- 10 For the preceding, *Ashok Kumar Gupta v. State of UP*, (1997) 5 SCC 201; in particular, paras 23,25,26,42,46.

10. From equality of opportunity to that of outcomes, From absence of disabilities to presence of abilities, From providing assistance to imposing handicaps

- 1 *State of Kerala v. N.M. Thomas*, 1976 2 SCC 310, at 346, para 75.
- 2 *Akhil Bharatiya Soshit Karamchari Sangh v. Union of India*, (1981) 2 SCR 185; AIR (1981) SC 298. He quotes this observation himself in *Vasanth Kumar*, op. cit., at 1527, para 76.
- 3 (1984) 3 SCC 654.
- 4 *Post-Graduate Institute of Medical Education and Research v. K.L. Narasimhan*, (1997) 6 SCC 283, at 305 – 06, para 22.
- 5 *Saurabh Chaudri v. Union of India*, (2003) 11 SCC 146, at 170, para 49.
- 6 *Marri Chandra Shekhar Rao v. Dean, Seth G.S. Medical College*, (1990) 3 SCC 130, at 138, para 8.
- 7 *Ashok Kumar Gupta v. State of U.P.*, (1997) 5 SCC 201, at 227 – 31, paras 28 – 30.

- 8 See, for instance, *Union of India v. Madhav*, (1997) 2 SCC 332; *Union of India v. Brij Lal Thakur*, (1997) 4 SCC 278; *Post Graduate Institute of Medical Education and Research, Chandigarh v. K.L. Narasimhan*, (1997) 6 SCC 283.
- 9 *Post Graduate Institute of Medical Education and Research, Chandigarh v. Faculty Association*, (1998) 4 SCC 1.
- 10 1974 (1) SCC 87.
- 11 *Ibid.*, in particular paras 25 – 26, 32, 33 – 35.
- 12 *Bhim Singhji v. Union of India*, (1981) 1 SCO 166, at 186, para 20.
- 13 See, for instance, *Saurabh Chaudri v. Union of India*, *op. cit.*, at 179, para 85, in which it is invoked.

11. ‘Merit-mongers’

- 1 *Akhil Bharatiya Soshit Karamchhari Sangh (Rly.) v. Union of India*, (1981) 1 SCC 246, at 297, para 93.
- 2 *Ibid.*, para 94.
- 3 *Ibid.*, at 299, para 97.
- 4 *Ibid.*, at 298, para 96.
- 5 *Ibid.*, at 267, para 30.
- 6 *Ibid.*, at 279, para 58.
- 7 *Ibid.*, at 281, para 61.
- 8 *Ibid.*, at 277 – 78, 282.
- 9 *Ibid.*, at 294 para 84.
- 10 *Ibid.*, at 297, para 92.
- 11 *Ibid.*, at 299, para 98.
- 12 *Ibid.*, at 289, para 77.
- 13 *KG Vasanth Kumar v. State of Karnataka*, (1985) Supp. SCC 714, at 765, para 76.
- 14 *Ibid.*, at 737, para 35.
- 15 *Akhil Bharatiya Soshit Karamchhari Sangh (Rly.) v. Union of India*, (1981) 1 SCC 246, at 301 – 02, paras 101 – 02.
- 16 *Ibid.*, at 26, and at 300, para 100.

12. In any case, what is ‘merit’?

- 1 *K.C. Vasanth Kumar v. State of Karnataka*, (1985) Supp. SCC 714, at 737 – 38, para
- 2 On all this, see *K.C. Vasanth Kumar v. State of Karnataka*, (1985) Supp. SCC 714 at 738 – 40; recalled often, for instance in *Indra Sawhney v. Union of India*, *op. cit.*, at 506, para 404; *Ashok Kumar Gupta*, *op. cit.*, para 36.
- 3 *Indra Sawhney v. Union of India*, *op. cit.*, at 506-07, para 404 to 408.
- 4 *Ibid.*, at 549, paras 508 – 10.
- 5 *Ibid.*, at 442, paras 270.
- 6 *Indra Sawhney v. Union of India*, *op. cit.*, at 650, para 674.
- 7 *Ibid.*, at 538, 543, paras 482, 495.
- 8 Cf., *Report of the Backward Classes Commission*, First Part, Volumes I and II, Government of India, New Delhi, 1980, Chapter VIII, pp. 31 – 36.

- 9 *Indra Sawhney*, op. cit., at 504, para 401.
- 10 *N.M. Thomas*, op. cit., at 377, para 158.
- 11 *Indra Sawhney*, op. cit., at 400, para 143.
- 12 *Ibid.*, at 403, para 153.
- 13 *Ibid.*, at 404, para 156.
- 14 *Saurabh Chaudri v. Union of India*, (2003) 11 SCC 146, at 164, para 38.
- 15 *Ashok Kumar Gupta v. State of U.P.*, (1997) 5 SCC 201, at 231, para 34.
- 16 *Post-Graduate Institute of Medical Education and Research v. K.L. Narasimhan*, (1997) 6 SCC 283, at 300, para 16.

13. A lecture on induction!

- 1 For such lists, see for example, Rajya Sabha, *Department-related Parliamentary Standing Committee on Home Affairs, Sixty-sixth Report on the Constitution (Eighty-eighth Amendment) Bill*, 28 July 2000, Rajya Sabha Secretariat, pp. 5, 6, 33 – 34.
- 2 *Department-related Parliamentary Standing Committee on Home Affairs, Sixty-sixth Report on the Constitution (Eighty-eighth Amendment) Bill*, op. cit., p. 10.
- 3 *Apt Singh Januja v. State of Punjab*, (1996) 2 SCC 715, at 735, para 16. See also, *R.K. Sabharwal v. State of Punjab*, (1995) 2 SCC 745; and *Union of India v. Virpal Singh Chauhan*, (1995) 6 SCC 684.
- 4 (1999) 7 SCC 209.
- 5 (1999) 7 SCC 251.
- 6 (1999) 7 SCC 257.
- 7 (1999) 8 SCC 213.
- 8 (2001) 2 SCC 666.
- 9 *M.G. Badappananvar v. State of Karnataka*, (2001) 2 SCC 666, at 672, para 12.
- 10 *Ibid.*, at 672 – 73, para 13.
- 11 *Ibid.*, at 674, para 19.
- 12 *Indra Sawhney v. Union of India*, (1992) Supp. (3) SCC 217, at 624, paras 623 – 24.
- 13 See, *Ashok Kumar Gupta v. State of U.P.*, (1997) 5 SCC 201.
- 14 *E.V. Chinnaiah v. State of Andhra Pradesh*, (2005) 1 SCC 394, at 435, para 114.
- 15 The Commission was headed by Dr Sarvapalli Radhakrishnan, and had Dr Zakir Hussain and other distinguished educationists as members.
- 16 *M.R. Balaji v. State of Mysore*, (1963) Supp. (1) SCR 439, para 32.
- 17 *General Manager, Southern Railway v. Rangachari*, (1962) 2 SCR 586, 596.
- 18 *State of Punjab v. Nivedita Jain*, AIR (1981) SC 2045; (1981) 4 SCC 296.

14. Induction in practice!

- 1 *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310, at 393 – 94, para 205.
- 2 *K.C. Vasanth Kumar v. State of Karnataka*, (1985) Supp. SCC 714, at 772, para 88.
- 3 *State of Madhya Pradesh v. Nivedita Jain*, (1981) 4 SCC 296.
- 4 For the instances, see *Anupam Thakur Singh v. State of Bihar*, (1994) 4 SCC 401, 420
- 5 In this context the court cites as examples *Chitralekha v. State of Mysore*, AIR (1964) SC 1823; *Janki Prasad Parimoo v. State of Jammu and Kashmir*, (1973) 1 SCC 420; and *M.R. Balaji v.*

State of Mysore, (1963) Supp. (1) SCR 439.

6 *Ajay Kumar Singh*, op. cit., at 408, para 6.

7 On the preceding, *Ajay Kumar Singh*, op. cit., at 408–09, paras 4–8.

8 *Ajay Kumar Singh*, op. cit., at 409, para 8.

9 (1980) 2 SCC 768, at 778, paras 20 to 23. See also *Pradeep Jain v. Union of India* (1984) 3 SCC 654.

10 Of course, from Justice V.R. Krishna Iyer, speaking for himself and Justice O. Chinnappa Reddy! Their judgment has the usual prose on empathy also.

11 See, *Ajay Kumar Singh v. State of Bihar*, op. cit., paras 17 to 24.

12 See, for instance, *Saurabh Chaudri v. Union of India*, (2003) 11 SCC 146, para 43; *Ajay Kumar Singh*, op. cit., paras 2,4.

13 See, *Jagdish Saran*, op. cit., para 25; *Ajay Kumar Singh*, op. cit., para 10.

14 *Post-Graduate Institute of Medical Education and Research v. K.L. Narasimhan*, (1997) 6 SCC 283, at 308, para 25.

15 *Post-Graduate Institute of Medical Education and Research*, op. cit., at 308 – 09, paras 25 – 26.

16 *Ashok Kumar Gupta v. State of U.P.*, (1997) 5 SCC 201, at page 225, para 26.

15. Timorousness compounded by principle!

1 *Ram Bhagat Singh v. State of Haryana*, (1997) 11 SCC 417, at 420, para 4.

2 *State of Bihar v. Bal Mukund Sah*, (2000) 4 SCC 640, at 725, para 67.

3 *Ram Bhagat Singh v. State of Haryana*, (1997) 11 SCC 417, at 420, para 5.

4 *Comptroller and Auditor General of India v. K.S. Jagannathan*, (1986) 2 SCC 679.

5 See, for instance, *Ajit Singh v. State of Punjab (II)*, (1999) 7 SCC 209, in which a five-judge bench held that Article 16(4) is an enabling provision that merely confers a discretion on the executive to reserve some posts. It does not impose a duty on the state, nor does it confer a right on individuals. ‘Affirmative action stops where reverse discrimination begins,’ the court says in this important case.

6 See, Parmanand Singh, ‘Perspectives on *Soshit Sangh*,’ *SCC Journal* (1982) 1 SCC (Jour) 37.

7 *Akhil Bharatiya Soshit Karamchhari Sangh (Rly) v. Union of India*, (1981) 1 SCC 246; at 258, 260, 263, 264, 308; in particular paras 11, 14, 15, 20, 24, 122.

8 *Ajay Kumar Singh v. State of Bihar*, (1994) 4 SCC 401, at 409, para 9.

9 *Ashok Kumar Gupta v. State of U.P.*, (1997) 5 SCC 201, at 230, para 32.

10 *Indra Sawhney v. Union of India*, (1992) Supp. (3) SCC 217, at 456, 741, paras 300,820 – 21.

11 *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310, at 355, para 106.

12 *Indra Sawhney v. Union of India*, (1992) Supp. (3) SCC 217, at 361 – 62, paras 3,4.

13 *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310, at 398 – 99, paras 213 – 14.

14 *Ashok Kumar Gupta v. State of U.P.*, (1997) 5 SCC 201, at 242, para 47.

15 *Ibid.*, at 242, para 47.

16 *Ibid.*, at 244, paras 48 – 51.

17 *State of Bihar v. Bal Mukund Sah*, (2000) 4 SCC 640, at 727, para 76. In this, the judges were literally echoing the bugle Justice P.N. Bhagwati had sounded in the infamous *Transfer of Judges* case – right up to that line from Granville Austin!

- 18 *Akhil Bharatiya Soshit Karamchari Sangh (Rly) v. Union of India*, (1981) 1 SCC 246, at 297, para 92.
- 19 *Akhil Bharatiya Soshit Karamchari Sangh (Rly) v. Union of India*, (1981) 1 SCC 246, at 262-63, para 18, 19.
- 20 *Ibid.*, at 297, paras 93,94.
- 21 The reader who is distracted by the grandiloquence may want to read the judgment from the beginning: ‘*The Root Thought*: “The abolition of slavery has gone on for a long time. Rome abolished slavery, America abolished it, and we did, but only the words were abolished, not the thing.” (Leo N. Tolstoy) This agonising gap between hortative hopes and human dupes vis-à-vis that serf-like sector of Indian society, strangely described as Scheduled Castes and Scheduled Tribes (SCs & STs, for short), and the administrative exercises to bridge this big hiatus by processes like reservations and other concessions in the field of public employment, is the broad issue that demands constitutional examination in the Indian setting of competitive equality before the law and tearful inequality in life. A fasciculus of directions of the Railway Board has been attacked as *ultra vires* and the court has to pronounce on it, not philosophically but pragmatically. “The philosophers have only interpreted the world in various ways; the point is to change it” (*Theses on Feuerbach*, 1888, xi) -this was the founding fathers’ fighting faith and serves as perspective-setter for the judicial censor...’ [*Ibid.*, paras 1,2].
- 22 *Ibid.*, at 292, paras 88.
- 23 *Ibid.*, at 276, para 51.
- 24 *Ibid.*, at 261, para 16.
- 25 *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310, at 361, paras 118 – 19.
- 26 *K.C. Vasanth Kumar v. State of Karnataka*, (1985) Supp. SCC 714, at 737, para 34.

16. The situation in the field

- 1 *Ajit Singh v. State of Punjab (II)*, (1999) 7 SCC 209, at 234, para 41.
- 2 *Ibid.*, at 245, para 73.
- 3 *R.K. Sabharwal v. State of Punjab*, (1995) 2 SCC 745, at 748, para 1.
- 4 Posts of executive engineer and above are Class-I posts. The first promotion is due after serving for seven years as an assistant engineer. An officer attains the level of superintending engineer or deputy general manager after sixteen years of service.
- 5 *Indra Sawhney v. Union of India*, 1992 Supp. (3) SCC 217, para 743. Cited often, for instance in *Union of India v. Virpal Singh Chauhan*, (1995) 6 SCC 684, paras 23,24.

17. The state structure and beyond

- 1 Apart from *Indra Sawhney*, see, for instance, *Preeti Srivastava v. State of M.P.*, (1999) 7 SCC 120, paras 11,12,13,15,20; *State of Bihar v. Bal Mukund Sah*, (2000) 4 SCC 640, paras 32,38,48,58; *Ajit Singh v. State of Punjab (II)*, (1999) 7 SCC 209, para 18.
- 2 See, *Report of the National Commission to Review the Working of the Constitution*, Volume 1,2002, pp. 116,123,510.
- 3 See, for instance, *Indra Sawhney v. Union of India*, op. cit., at 370, 385, 533 – 35, 440, 447, 463, 712, 716, 727, paras 34, 83 – 87, 89 – 92, 267 – 68, 282, 323(5), 474 – 78, 777, 782, 796 – 97.

- 4 Mancur Olson, *The Rise and Decline of Nations*, Yale, New Haven, 1982. The situation over several swathes of the country has deteriorated so much that by now the analysis in terms of ‘stationary bandits’ as against ‘roving bandits’ Olson presented in *Power and Prosperity*, Basic Books, New York, 2000, rings closer to the facts!

18. The other way

- 1 Justice O. Chinnappa Reddy in *K.C. Vasanth Kumar v. State of Karnataka*, (1985) Supp. SCC 714, at 752, para 58.
- 2 See, for instance, Planning Commission, *Midterm Appraisal of Ninth Five Year Plan, 1997 – 2002*, Government of India, October 2000, p. 163.
- 3 *Midterm Appraisal of Ninth Five Year Plan, 1997 – 2002*, op, cit., p. 483.
- 4 Arvind Sharma, *Classical Hindu Thought, An Introduction*, Oxford University Press, New Delhi, 2000, pp. 132 – 80; Arvind Sharma, *Modern Hindu Thought, An Introduction*, Oxford University Press, New Delhi, 2005, pp. 126 – 70.
- 5 See, for instance, R. Vaidyanathan, ‘Caste as social capital’, 10 April 2006, http://newsinsight.net/columns/full_column22.htm.
- 6 *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310 at 400 – 01, para 221.
- 7 (1963) Supp. (1) SCR 439; AIR (1963) SC 649.
- 8 *State of Kerala v. N.M. Thomas*, op, cit., at 405 – 06, para 232.
- 9 *The New Indian Express*, 3 January 2005.

Three slaps

- 1 When I began work for this Epilogue, I naturally looked up the *Supreme Court Cases* records with the help of their excellent software to get an idea of the judgments which one way or another had a bearing on points that have been discussed earlier in this book. In no time, the database listed 400 recent judgments! I sought the guidance of my friends, Ashok Desai, the former Attorney General of India, and Arvind Datar, the noted constitutional scholar, about the judgments on which, from among these, I should focus. I am in their debt for steering me to the significant judgments. I am grateful also to Anupama Kumar and Jai Dehadrai who led me to the contrasting high court interpretations of *M. Nagaraj*. And I am equally in the debt to my friend Sanjay Kapoor of *Supreme Court Cases* for enabling me to have ready access to SCC’s exceptional software and record of judgments. Advocate Vivek Reddy sent me the Andhra judgments and led me through the course of litigation on the Muslim reservation cases in Andhra.
- 2 The chronology and other facts are put together from judgments of the Andhra Pradesh High Court in *T. Murlidhar Rao v. State of Andhra Pradesh*, 2004 (6) ... ALD 1 (LB); *B. Archana Reddy v. State of Andhra Pradesh*, 2005 (6) ALD 582 (LB); and *T. Murlidhar Rao v. State of Andhra Pradesh*, 2010 (2) ALD 492 (LB). The cases were decided by benches of five judges, five judges and seven judges respectively.
- 3 *T. Murlidhar Rao v. State of Andhra Pradesh*, 2004 (6) ALD 1 (LB), para 108. Unless otherwise indicated, italics, wherever they occur in this Epilogue, have been used by me. Similarly, the explanatory words that appear within square parentheses have been added by me – save the citations of issues of SCC, AIR, etc., that occur within passages from judgments. These occur in the judgments themselves.

- 4 Ibid., para 249.
- 5 Ibid., paras 239,249.
- 6 Ibid., paras 228,229,249.
- 7 Ibid., para 134.
- 8 Ibid., para 122.
- 9 Ibid., para 132.
- 10 Ibid., para 143.
- 11 Ibid., paras 234,235,249.
- 12 *B. Archana Reddy v. State of Andhra Pradesh*, 2005 (6) ALD 582 (LB).
- 13 Ibid., paras 127,351,355,382.
- 14 Ibid., para 105.
- 15 Ibid., paras 284,292,293,342,379.
- 16 Ibid., para 378.
- 17 Ibid., paras 83,250,267,373.
- 18 Ibid., para 66.
- 19 Ibid., para 71.
- 20 Ibid., paras 114,115.
- 21 Ibid., paras 106,109,119
- 22 Ibid., paras 136,145.
- 23 Ibid., paras 312,317.
- 24 Ibid., para 342.
- 25 Ibid., para 105.
- 26 Ibid., para 119.
- 27 *T. Murlidhar Rao v. State of Andhra Pradesh*, 2010(2) ALD 492 (LB). Four of the seven judges delivered a common judgment. Writing a separate judgment, one judge agreed with them in the large. Each of the remaining two judges delivered separate judgments disagreeing with the others.
- 28 Ibid., Chief Justice Anil Dave on his behalf and that of Justices A. Gopal Reddy, V. Eshwaraiah and G. Raghuram, para 201.
- 29 Ibid., para 188.
- 30 On the foregoing, Ibid., paras 138 – 48.
- 31 Ibid., para 204; Justice T. Meena Kumari, paras 91 – 93.
- 32 Ibid., paras 73 – 88, 204. ‘Strict scrutiny’ in contrast to the two milder degrees of scrutiny that would be relevant in other instance – the ‘initial’ and ‘intermediary’ scrutiny that are more deferential towards actions of legislatures and the executive.
- 33 Ibid., Justice D.S.R. Varma, para 186(5,6).
- 34 Ibid., Chief Justice Anil Dave and others, op. cit., para 86.
- 35 Ibid., paras 98,204.
- 36 Ibid., Justice D.S.R. Varma, para 186(8).
- 37 Ibid., Justice D.S.R. Varma, para 186 (5).
- 38 *State of Andhra Pradesh v. Archana Reddy*, Supreme Court, 4 January 2006.
- 39 *State of A.P. v. Murlidhar Rao*, Supreme Court, 25 March 2010, *Manu/SC/0225/ 2010*.
- 40 For a fine analysis pinpointing the grave infirmity in the Supreme Court’s order, see Sanjay Venkatachari, ‘Nullifying unconstitutionality’, (2010) 3 SCC J 31.
- 41 The appeal in the *B. Archana Reddy* case.

The politicians' response

- 1 Among the host of judgments that bear on this point is the well-known one in *St. Stephen's College v. University of Delhi*, (1992) SCC 558. The propositions by which the court decided the case are typical, and perhaps it should be read for that reason alone. The judgment is exceptional for another reason, however, and for that it certainly deserves to be read: it is exceptional because of the exceptional dissent of Justice N.M. Kasliwal, a dissent that sets out the consequences that the propositions which have been internalized by our polity, and unfortunately by our judges, shall bring down on our education system and on the country as such.
- 2 *General Manager, Southern Railway v. Rangachari*, AIR 1962 SC 36. The sequence of judgments by which we have reached the present pass has been recalled many times over in successive judgments of the Supreme Court itself – with the points that are picked up for emphasis varying from one judgment to another. See, for instance, in the recent case that we shall be examining below, *M. Nagaraj v. Union of India*, (2006) 8 SCC 212.
- 3 *M.R. Balaji v. State of Mysore*, AIR 1963 SC 649.
- 4 *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310.
- 5 As this is the sort of element, and it was a crucial one that was shoved aside within just a few months, it will be worthwhile to read what the court had said on the matter, and why. It had held: Take a unit/service/cadre comprising 1000 posts. The reservation in favour of Scheduled Tribes, Scheduled Castes and Other Backward Classes is 50% which means that out of the 1000 posts 500 must be held by members of these classes, i.e., 270 by Other Backward Classes, 150 by Scheduled Castes and 80 by Scheduled Tribes. At a given point of time, let us say, the number of members of OBCs in the unit/ service/category is only 50, a shortfall of 220. Similarly, the number of members of Scheduled Castes and Scheduled Tribes is only 20 and 5 respectively, a shortfall of 130 and 75. If the entire service/cadre is taken as a unit and the backlog is sought to be made up, then the open competition channel has to be choked altogether for a number of years until the number of members of all Backward Classes reaches 500, i.e., till the quota meant for each of them is filled up. This may take quite a number of years because the number of vacancies arising each year are not many. Meanwhile, the member of open competition category would become age-barred and ineligible. Equality of opportunity in their case would become a mere mirage. It must be remembered that the equality of opportunity guaranteed by clause (1) is to each individual citizen of the country while clause (4) contemplates special provision being made in favour of socially disadvantaged classes. Both must be balanced against each other. Neither should be allowed to eclipse the other. For the above reason, we hold that for the purpose of applying the 50% rule a year should be taken as the unit and not the entire strength of the cadre, service or the unit as the case may be [*Indra Sawhney v. Union of India*, (1992) Supp 3 SCC 217, para 814].
- 6 *R.K. Sabharwal v. State of Punjab*, (1995) 2 SCC 745.
- 7 *R.K. Sabharwal v. State of Punjab*, (1995) 2 SCC 745: 'It is, therefore, incumbent on the State Government to reach a conclusion that the Backward Class/Classes for which the reservation is made is not adequately represented in the State Services. While doing so the State Government may take the total population of a particular Backward Class and its representation in the State Services'; '... The percentage of reservation is the desired representation of the Backward Classes

in the State Services and is consistent with the demographic estimate based on the proportion worked out in relation to their population'; paragraphs 4 and 5 respectively.

- 8 Arvind P. Datar, *Commentary on the Constitution of India*, Volume I, LexisNexis Butterworths Wadhwa, Nagpur, 2007/2010, p. 242.
- 9 *S. Vinod Kumar v. Union of India*, (1996) 6 SCC 580.
- 10 *Union of India v. Virpal Singh Chauhan*, (1995) 6 SCC 684.
- 11 *Jagdish Lal v. State of Haryana*, (1997) 6 SCC 538.
- 12 *Ajit Singh Januja v. State of Punjab*, (1999) 7 SCC 209.
- 13 *M.G. Badappanvar v. State of Karnataka*, (2001) 2 SCC 666.

The judges' response

- 1 *M. Nagaraj v. Union of India*, (2006) 8 SCC 212, para 41.
- 2 *Raghunathrao Ganpatrao v. Union of India*, 1993 Supp (1) SCC 191.
- 3 *M. Nagaraj v. Union of India*, (2006) 8 SCC 212, para 30. Invoked and, as we shall soon see, forged into a wrecking hammer, for instance, in *Indian Medical Association v. Union of India*, (2011) 7 SCC 179.
- 4 *Indian Medical Association v. Union of India*, (2011) 7 SCC 179, constitutes a ready example of invoking sundry studies to substantiate hyperbole against liberalization-privatization-globalization – the three taken as one word!
- 5 *Saurabh Chaudri v. Union of India*, (2003) 11 SCC 146, paras 41 – 12.
- 6 *Gangadharan, M.P. v. State of Kerala*, (2006) 6 SCC 162, para 34.
- 7 *All India Institute of Medical Sciences Students Union v. All India Institute of Medical Sciences*, (2002) 1 SCC 428.
- 8 *K. Doraiswamy v. State of Tamil Nadu* (2001) 2 SCC 538, and *State of Madhya Pradesh v. Gopal D. Tirthani*, (2003) 7 SCC 83.
- 9 *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1, paras 106, 109 – 11, 358 contrasted with para 636.
- 10 *Pradeep Jain v. Union of India*, (1984) 3 SCC 654, para 12.
- 11 *Saurabh Chaudri v. Union of India*, (2003) 11 SCC 146, paras 38 – 39.
- 12 *State of Andhra Pradesh v. A.P. Sagar*, AIR 1968 SC 1379, para 9.
- 13 *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1, para 337.
- 14 *Ibid.*, para 310, 312, 325, 358.
- 15 *Ibid.*, para 579-358.
- 16 *Ibid.*, para 220.
- 17 *M. Nagaraj v. Union of India*, (2006) 8 SCC 212.
- 18 *State of Punjab v. Manjit Singh*, (2003) 11 SCC 559.
- 19 *Ibid.*, in particular para 9.
- 20 *Union of India v. Pushpa Rani*, (2008) 9 SCC 242, paras 37,40,42. *Hira Lal's* case was about whether the Government of Punjab could reserve promotions in 10 per cent of posts for SCs/STs. The Punjab And Haryana High Court had struck down the Punjab provision. The Supreme Court upheld the provision. Contrast the premise towards the frustrations, etc., of seniors who are superseded on which the judges held forth in this case with what the Allahabad High Court

concluded about the effects that such supersessions will have on the efficiency of administration in *Prem Kumar Singh v. State of Uttar Pradesh*, a case to which we turn in a moment.

- 21 Ibid., para 61.
- 22 Cf, Editor's note in *Supreme Court Educational Institutions Cases*, Sumeet Malik (ed.), Eastern Book Company, Lucknow, 2008, at pp. 314-15. Malik's observations are based on paras 170,173,175 in *Ashoka Kumar Thakur*, (2008) 6 SCC 1.
- 23 *Chattar Singh v. State of Rajasthan*, (1996) 11 SCC 742.
- 24 See, *Andhra Pradesh Public Services Commission v. Balaji Badhavath*, (2009) 5 SCC 1.
- 25 *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1
- 26 Ibid., para 146, 160-62, 176, 182-86, 231-14, 231, 234.
- 27 Ibid., para 666.
- 28 Ibid., paras 238,277,281,284 310,312,319,230,357,358.
- 29 Ibid.,paras364,365,371,557 – 71,573 – 76,579 – 80,588 – 89,599,601 – 02,605,625,637.
- 30 *Hussainara Khatoon v. Home Secretary, State of Bihar*, (1980) 1 SCC 81. The matter was taken up in succeeding years and its progression can be gleaned in subsequent cases up to *Hussainara Khatoon v. Home Secretary, State of Bihar (VII)*, (1995) 5 SCC 326.
- 31 Cf, *Governance, and the sclerosis that has set in*, ASA, Rupa, 2004; in particular, 'Demand and file', pp. 161 – 80.
- 32 *Mridul Dhar v. Union of India*, (2005) 2 SCC 65.
- 33 Letters to Shyamlal Yadav, senior assistant editor, *Indian Express*, from the assistant director general (Medical Examination Cell), Directorate General of Health Services, and from the undersecretary of the Ministry of Health and Family Welfare, dated 24 January and 21 February 2012, respectively.
- 34 (1984) 3 SCC 654.
- 35 (1985) 3 SCC 22.
- 36 (1986)3 SCC 727.
- 37 The directions given in this case were modified in various ways in a number of decisions that concerned the issue. They are: *Dr Dinesh Kumar (III)*, [1987] 3 SCR 744; *Dr Dinesh Kumar (IV)*, [1988] 1 SCR 351; *Dr Dinesh Kumar (V)*; *Dr Dinesh Kumar (VI)*; *Dr Dinseh Kumar (VII)* (1987) 2 SCALE 22; *Dr Dinseh Kumar (VIII)*, (1988) 1 SCALE 428; *Dr Dinseh Kumar (IX)*, AIR 1990 SC 2030.
- 38 (2003) 11 SCC 146.
- 39 (2005) 13 SCC 61.
- 40 (2009) 17 SCC 705.
- 41 The two paragraphs read as follows:
 6. The Additional Solicitor General pointed out that in the all-India quota of 50% seats, if 22.5% are reserved for SC/ST students, it would be difficult for the State to give the entire percentage to reservation out of the 50% seats left for them to be filled up. It is equally difficult for DGHS to have the entire 22.5% reservation out of the 50% of the seats allotted to be admitted in the All-India Entrance Examination. Therefore, it is suggested that the Union of India has decided to provide 22.5% reservation for SC/ST candidates in all-India quota from the academic year 2007 – 2008 onwards.
 7. The Union of India seeks clarification of the order passed in *Buddhi Prakash Sharma v. Union of India* [(2005) 13 SCC 61] passed on 28 – 2-2005, to the effect that 50% seats for all-India

quota shall exclude the reservation. We review that order and make it clear that the 50% of the seats to be filled up by All-India Entrance Examination shall include the reservation to be provided for SC/ST students. To that extent the order passed on 28 – 2-2005 [(2005) 13 SCC 61] is clarified.

- 42 *St. Stephen's College v. University of Delhi*, (1992) 1 SCC 558.
- 43 *Islamic Academy of Education v. State of Karnataka*, (2003) SCC 697.
- 44 *P.A. Inamdar v. State of Maharashtra*, (2005) 6 SCC 537.
- 45 *Ibid.*, para 20.
- 46 Cf, *State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226 – this was one of the cases that triggered the first amendment to the Constitution.
- 47 *Mohammed Hanif Quareshi v. State of Bihar*, AIR 1958 SC 731.
- 48 For a compact listing of some of the cases, see Arvind Datar, *Commentary on the Constitution of India*, op. cit., Volume I, pp. 567 – 77.
- 49 *Mohini Jain (Miss) v. State of Karnataka*, (1992) 3 SCC 666, para 9.
- 50 *Unni Krishnan, J.P. v. State of Andhra Pradesh*, (1993) 1 SCC 645, para 165.
- 51 *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1, para 195.
- 52 *M. Nagaraj v. Union of India*, (2006) 8 SCC 212.
- 53 *Ibid.*, para 19.
- 54 *Ibid.*, para 102.
- 55 *Ibid.*, para 28. See paras 79, 102, 117 for the application of this criterion to validate the amendments that had been challenged. They change things, the court says, but they do not entail a new Constitution.
- 56 *Ibid.*, para 79.
- 57 *Ibid.*, para 20, 26.
- 58 *Ibid.*, for instance, paras 108,117.
- 59 *Ibid.*, for instance, paras 46,107.
- 60 *Ibid.*, for instance, para 117.
- 61 *Ashoka Kumar Thakur v. Union of India*, (2008) 6 SCC 1, para 494.
- 62 *M. Nagaraj*, op. cit., para 46.
- 63 *Ibid.*, para 102.
- 64 *Ibid.*, para 107.
- 65 *Ibid.*, para 117.
- 66 *Ibid.*, para 45.
- 67 *Ibid.*, para 49.
- 68 *Ibid.*, para 107-08.
- 69 *Ibid.*, para 107-08.
- 70 See, for instance, *Gurvinder Singh v. State of Rajasthan*, 2010 Raj HC, Civil Writ Petition no. 13491/2009; *Lagnajit Ray v. State of Orissa*, (2011) 1 OLR 689; *Sibananda Choudhry v. State of Assam*, (2010) 6 GLR 585; *Anupam Thakur v. State of Himachal Pradesh*, MANU/HP/1976/2011.
- 71 *Prem Kumar Singh v. State of Uttar Pradesh*, (2011) 1ADJ 549.
- 72 *Ibid.*, para 20.
- 73 *Union of India v. Pushpa Rani*, (2008) 9 SCC 242, paras 37,40,42, dealt with above.
- 74 *Ibid.*, in particular paras 27,33,35,92,165 – 69,187,188.

75 *Sanjeev Kumar Singh v. State of Uttar Pradesh*, MANU/UP/1756/2006, Special Appeal 592 of 2006.

76 Cf. *Bijender Singh v. Union of India*, WP(C) No. 3450/2011, MANU/DE/1992/ 2011.

77 *Indian Medical Association v. Union of India*, (2011) 7 SCC 179.

78 This clause guarantees every citizen the Fundamental Right ‘to practise any profession, or to carry on any occupation, trade or business’.

79 *Ibid.*, paras 205 – 06.

80 *Ibid.*, para 208.

81 *Ibid.*, para 207.

82 This is how Justice Ruma Pal put the matter:

Often judges misconstrue judicial independence as judicial and administrative indiscipline. Both of these in fact stem from judicial arrogance as to one’s intellectual ability and status. A judge’s status like other holders of public posts is derived from the office or the chair. One has to merely occupy that chair during one’s tenure with dignity and remember that each time a lawyer bows and says ‘Deeply obliged’, the bow is addressed to the office and not to the person. The Supreme Court has laid down standards of judicial behaviour for the sub-ordinate judiciary such as “*He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamour, regardless of public praise*” [*High Court of Judicature at Bombay v. Shirishkumar Rangrao Paul*, (1997) 6 SCC 339, at page 355] but sadly some members of the higher judiciary exempt themselves from the need to comply with these standards. Intellectual arrogance or what some may call intellectual dishonesty is manifest when judges decide without being bound by principles of *stare decisis* or precedent. [See for example *State of U.P. v. Jeet S. Bisht*, (2007) 6 SCC 586, at page 623.] Independence no doubt connotes freedom to decide but the freedom is not absolute. It is bound to be in accordance with law. Otherwise we have lawyers and the sub-ordinate judiciary baffled while ‘mastering the lawless science of our law’ faced with ‘that codeless myriad of precedent, that wilderness of single instances.’ [Alfred Tennyson], Independence implies discipline to decide objectively and with intellectual integrity and as the judicial oath of office requires, without fear, favour, affection or ill will...

Justice Ruma Pal, *An Independent Judiciary*, Tarkunde Memorial Lecture, 10 November 2011.

83 *Indian Medical Association v. Union of India*, op. cit., para 209.

84 *Ibid.*, para 210, 211.

85 *Ibid.*, para 2.

86 In para 202 of the judgment.

87 *Ibid.*, para 180.

88 *Ibid.*, para 182.

89 *Ibid.*, para 202.

90 *Ibid.*, para 226.

91 *Ibid.*, para 196-99.

92 *Ibid.*, para 226.

93 *Ibid.*, para 223.

94 *Ibid.*, para 201.

95 *Ibid.*, para 194.

96 *Ibid.*, para 123.

97 *Ibid.*, para 144.

98 Ibid., para 149.

99 *I.R. Coelho v. State of Tamil Nadu*, (2007) 2 SCC 1.

100 Ibid., paras 138 – 39. The same reasoning for the distinction is spelt out in several places; for instance in paras 126 – 27.

101 Ibid., para 200.

102 Ibid., paras 147-50.

103 Ibid., para 150.

104 Ibid., paras 151 – 56, 161 – 63, 201.

105 Ibid., para 172; see also paras 167 – 68 to the same effect.

106 For an analysis of these see, my *The Parliamentary System, What we have made of it, What we can make of it*, ASA, Rupa, 2007. In particular, pp. 126 – 40, 149 – 70.

107 *Glanrock Estate Private Limited v. State of Tamil Nadu*, (2010) 10 SCC 96.

108 Ibid., para 24.

109 Ibid., para 25.

110 Cf, *R.K. Sabharwal*, op. cit., paras 4 and 5; and *Indian Medical Association*, op. cit., paras 172 and 173.

111 *Glanrock Estate Private Limited v. State of Tamil Nadu*, op. cit., paras 27, 28.

112 Ibid., para 29.

113 Ibid., para 30.

114 Ibid., para 30.

115 Ibid., paras 30, 31.

116 Ibid., para 73.